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Race Relations Law Reporter

**A Complete, Impartial
Presentation of Basic
Materials, Including:**

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Recent Developments

. . . A Summary

Education

In an action to compel Negroes' admission to a certain school in a Jefferson County, *Arkansas*, school district, a decision that defendant school officials could not invoke the state pupil placement act and that plaintiffs were not required thereunder to exhaust administrative remedies, was reversed by the Eighth Circuit Court of Appeals which also directed that segregation practices be enjoined (p. 43). The state supreme court upheld the state "teacher affidavit law" (p. 101).

The Atlanta, *Georgia*, board of education proposed a desegregation plan for city schools; the federal district court ordered the plan amended so that assignment requests thereunder would be more expeditiously handled and race would not be a factor in applying assignment criteria; and the effective date of the plan, so amended, was delayed until May 9, 1960, to allow time for legislative action (p. 56). [A later order authorized delay until May 1, 1961].

The *Louisiana* Supreme Court, refusing for lack of jurisdiction to review an Orleans Parish trial court's decision that the right to classify schools racially in "any city of more than 300,000 population" had been statutorily reserved to the legislature, transferred the case to the parish appeal court (p. 72).

In a class suit originally filed by Negroes to obtain admission to a Greensboro, *North Carolina*, "white" school, plaintiffs moved to amend their complaint to allege that defendant school officials, after admitting plaintiffs to the white school, had acted to perpetuate school segregation by approving reassignment requests of all white students and transfer requests of all white teachers of the school and by electing an all-Negro faculty. The federal court denied the motion because the class action was inappropriate under the state pupil assignment act and plaintiffs had not exercised their administrative remedy of requesting reassignment; instead, defendants' motion for summary judgment on the ground of mootness was granted (p. 75).

Knoxville, *Tennessee*, school officials were ordered by federal court to submit by April 8, 1960, a school desegregation plan (p. 80). A

state court held that segregation statutes as applied to private schools are not unconstitutional under the *School Segregation Cases* (p. 91).

A federal court ordered the admission of eight Negro children to specified Alexandria, *Virginia*, white schools upon determining that their transfer requests had been denied through an improper application of approved assignment criteria, but denials of nine other requests were upheld (p. 81).

The *Washington* Supreme Court held that a child's education by its parents in a "home" school failed to meet statutory standards for private schools (p. 94), and that a Spokane school district's "released time" program violates the state constitution (p. 85).

Governmental Facilities

Refusal by a privately-owned restaurant, operating at the Atlanta, *Georgia*, airport terminal within space leased from the city, to serve a Negro was held by a federal court to be state action violative of equal protection rights (p. 138).

A federal court enjoined a theater operator from racially discriminatory use of an opera house leased from the city of Frederick, *Maryland* (p. 151).

Injunctive relief to Harris County, *Texas*, Negroes against alleged racially discriminatory operation of a county-owned beach park was denied by a federal court for failure to exhaust administrative remedies (p. 146).

In an action by Norfolk, *Virginia*, Negroes challenging racially segregated seating in a city-owned arena, admittedly enforced in compliance with state statutes, a federal court abstained for the present from enjoining such practice because plaintiffs have an appropriate remedy in state courts through a declaratory judgment proceeding (p. 142).

Housing

Recently-enacted *California* legislation forbids racial discrimination in selling or leasing publicly-assisted housing (p. 250).

A federal court declined to enjoin housing

developers from refusing to sell to Negroes, and to enjoin Harford county, *Maryland*, commissioners and an Army center's commanding officer from furnishing water and sewage service to the developers so long as they refuse to sell housing to Negroes, rejecting the argument that the governmental assistance makes the developers' action governmental action (p. 154).

The *New Jersey* Supreme Court affirmed a decision that FHA operations concerning certain real estate developments brought cases of alleged refusal to sell houses to Negroes within the authority of the state Division Against Discrimination over "publicly assisted housing" (p. 160).

Organizations

An *Arkansas* Supreme Court decision holding city ordinances requiring statements of organizations as to dues, fees, and contributions received on the ground that such information is pertinent in determining qualifications for tax exemption as non-profit organizations and is therefore incidental to a legal result was reversed by the United States Supreme Court as significant repressive state action encroaching upon freedoms of assembly and association, which the state had not justified by showing a compelling subordinating interest (p. 35).

Despite an order of the United States Supreme Court vacating a district court judgment staying proceedings in an action in the district court by the NAACP to enjoin the *Arkansas* Attorney General from an unconstitutional enforcement of certain state statutes against it, on remand the district court adhered to its original order to stay until efforts to secure a state court adjudication are exhausted. The Supreme Court had ruled that reference to state courts for construction of statutes challenged as violative of the federal Constitution "should not automatically be made," but the district court decided that the applicability of the statutes to the NAACP is purely a matter of state law (p. 179).

The *New York* Secretary of State refused to domesticate a foreign corporation on the ground that it is a pro-segregation organization precluded by the corporation laws from doing business in the state (p. 259).

Public Accommodations

A recently-enacted *California* statute prohibits the denial, because of race, religion, or

national origin, of equal accommodations to persons by all business establishments (p. 249).

The *Delaware* Supreme Court held that the leasing of space in a public parking building by a state agency to a restaurant proprietor in order to defray part of the operating expense of providing the public offstreet parking is insufficient to make racially discriminatory action of the proprietor amount to state action (p. 194).

A federal court in *Illinois* held that innkeepers are subject to common law liability to provide racially non-discriminatory service (p. 200).

In *Maryland*, a federal court rejected the content in that admitting a foreign corporation to do business and issuing it a state restaurant license invested it with a public interest sufficient to make its refusal to serve Negroes equivalent to state action (p. 202).

A *Minnesota* court held that a Caucasian and his American Indian wife may use a cemetery lot free from racially discriminatory interference by the corporation that sold it to them, although the deed contained a covenant restricting use to Caucasians and the couple had falsely represented the wife's race (p. 186).

A newly-enacted *Kansas City, Missouri*, ordinance forbids racial discrimination in hotels, motels, and restaurants (p. 248).

The *New Jersey* Supreme Court affirmed decisions that the state Division Against Discrimination has statutory jurisdiction over public accommodations, that a restaurant's "private" dining rooms are public accommodations, and that a Negro group denied use of such rooms may take action under a remedial statute despite the availability of criminal penalties (p. 206).

Trial Procedure

The *Arkansas* Supreme Court reversed a Negro's conviction because of error in admitting evidence of an alleged re-enactment of the charged crime when such evidence was part of a coerced confession (p. 217).

An Indian's conviction was affirmed by the *Idaho* Supreme Court over the contention that the trial court had erroneously refused to grant a challenge to the jury array as unrepresentative for including only one or two Indians, there being no proof or offer of proof of racial discrimination (p. 230).

The *Maryland* Court of Appeals denied leave to appeal from a conviction of a petitioner who alleged inability to secure an impartial jury composed of members of his race, such conten-

tion having been waived when not raised below (p. 231).

The *South Carolina* Supreme Court upheld a Negro's rape conviction, holding the trial court had not erred in refusing to ask the jurors defense counsel's proffered question concerning possible race prejudice when counsel had been allowed to ask jurors on *voir dire* such questions as he chose (p. 232).

Voting

The United States Supreme Court reversed a decision of a district court in which an action by the United States under the 1957 Civil Rights Act to enjoin *Georgia* voting officials from depriving persons of voting rights for racial reasons had been dismissed because the Act unconstitutionally also authorizes the United States Attorney General to seek injunctions against private citizens for private action. The Supreme Court held that the Act, validly applied to the state action there alleged, should have been sustained without reference to hypothetical cases (p. 11).

In a similar action against Citizens Council members and the registrar of voters of Washington Parish, *Louisiana*, a decision upholding the Act's constitutionality as there applied (p. 112) was subsequently affirmed by the Supreme Court.

Miscellaneous

The Civil Rights Act of 1960 (p. 237) provides penalties for obstructing court orders; makes the crossing of state lines to avoid prosecution for damaging property a federal crime; restricts transportation of explosives; requires preservation of voting records and provides penalties for their destruction; authorizes a system of referees in disputed voting rights cases; and authorizes the federal government to provide, when otherwise unavailable, schooling for children of military personnel.

A conviction for fomenting a boycott of a Birmingham, *Alabama*, transit company's buses was reversed by the state court of appeals because the offense alleged had been created by a statute theretofore repealed (p. 216).

An *Arizona* superior court declared that state's miscegenation statute unconstitutional (p. 136).

Recently-enacted *California* legislation requires urban redevelopment projects to proceed without discrimination based on race, religion, or national origin (p. 252).

Fair employment laws were enacted in *California* (p. 242) and *New Mexico* (p. 246).

In connection with a condemnation suit by the city of Creve Coeur, the St. Louis, *Missouri*, Court of Appeals issued a writ of prohibition against a state circuit court's hearing Negro defendants' evidence that the city officials had chosen defendants' residential property for park purposes solely because of racial prejudice, the court stating that when private property is appropriated for public purposes courts are powerless to pass upon motives actuating the legislative body (p. 207).

The United States Supreme Court rendered a decision adverse to the Tuscarora Indian Nation in its protracted litigation to prevent appropriation of tribal lands by the *New York* State Power Authority for the Niagara Power Project (p. 16). A newly-enacted *New York* statute forbids discrimination in writing insurance because of race, creed, or national origin (p. 247).

Disorderly conduct and loitering convictions of a Negro by a Louisville, *Kentucky*, police court were reversed by the United States Supreme Court because evidentially unsupported and therefore in deprivation of due process (p. 7).

The Tenth Circuit Court of Appeals rejected the contention that the First Amendment limits the powers of Indian tribes to interfere with members' religious freedom (p. 109).

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UNITED STATES SUPREME COURT

CONSTITUTIONAL LAW Due Process—Kentucky

Sam THOMPSON v. CITY OF LOUISVILLE et al.

United States Supreme Court, March 21, 1960, 80 S.Ct. 624.

SUMMARY: In a trial of a Negro man in the Louisville, Kentucky, police court on charges of loitering and disorderly conduct, the city offered as its only evidence the testimony of an arresting police officer. The officer testified that on a certain evening he saw defendant dancing by himself in a cafe; that the arrest for loitering was then made after the cafe manager told him that defendant had been there over a half hour without buying anything and defendant had said he was there waiting on a bus; and that defendant became "very argumentative—he argued with us back and forth and so we placed a disorderly conduct charge on him." Defendant testified as to his legitimate purpose for being in the cafe, and the manager testified that he had not objected to defendant's presence or conduct. Defendant's motion to dismiss, on the ground that conviction on such evidence would deprive him of liberty and property without due process of law under the Fourteenth Amendment was denied, and he was convicted and fined \$10 on each charge. Because the small amount of the fines made the convictions nonappealable to any state court, and it appeared that the "Federal Constitutional claims are substantial and not frivolous," the state court of appeals granted a stay of execution to allow defendant time to petition the United States Supreme Court for certiorari before his claims became moot through serving out the fines in jail. *Taustine v. Thompson*, 322 S.W. 2d 100, 5 Race Rel. L. Rep. 233, *infra* (Ky. 1959). The Supreme Court reversed because there was no evidence in the record to support the convictions, and "it is a violation of due process to convict and punish a man without evidence of his guilt." There was nothing from which it could be inferred, the court held, that defendant was, in terms of the city ordinance against loitering, "without visible means of support" or unable to "give a satisfactory account of himself" or that he was loafing "without first having obtained consent of the owner or controller" of the premises. And, it concluded, merely arguing with a policeman is not disorderly conduct under Kentucky substantive law, which provides that one who is wrongfully arrested and fails to object to the arresting officer waives the right later to complain that the arrest was unlawful.

Mr. Justice Black delivered the opinion of the Court.

Petitioner was found guilty in the Police Court of Louisville, Kentucky, of two offenses—loitering and disorderly conduct. The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this

question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.

[Factual Summary]

The facts as shown by the record are short and simple. Petitioner, a longtime resident of the Louisville area, went into the Liberty End Cafe about 6:20 on a Saturday evening, January 24,

1959. In addition to selling food, the cafe was licensed to sell beer to the public and some 12 to 30 patrons were present during the time petitioner was there. When petitioner had been in the cafe about half an hour, two Louisville police officers came in on a "routine check." Upon seeing petitioner "out there on the floor dancing by himself," one of the officers, according to his testimony, went up to the manager who was sitting on a stool nearby and asked him how long petitioner had been in there and if he had bought anything. The officer testified that upon being told by the manager that petitioner had been there "a little over a half-hour and that he had not bought anything," he accosted Thompson and "asked him what was his reason for being in there and he said he was waiting for a bus." The officer then informed petitioner that he was under arrest and took him outside. This was the arrest for loitering. After going outside, the officer testified, petitioner "was very argumentative—he argued with us back and forth and so then we placed a disorderly conduct charge on him." Admittedly the disorderly conduct conviction rests solely on this one sentence description of petitioner's conduct after he left the cafe.

The foregoing evidence includes all that the city offered against him, except a record purportedly showing a total of 54 previous arrests of petitioner. Before putting on his defense, petitioner moved for a dismissal of the charges against him on the ground that a judgment of conviction on this record would deprive him of property and liberty¹ without due process of law under the Fourteenth Amendment in that (1) there was no evidence to support findings of guilt and (2) the two arrests and prosecutions were reprisals against him because petitioner had employed counsel and demanded a judicial hearing to defend himself against prior and allegedly baseless charges by the police.² This motion was denied.

[Defendant's Evidence]

Petitioner then put in evidence on his own behalf, none of which in any way strengthened the city's case. He testified that he bought, and one of the cafe employees served him, a dish of macaroni and a glass of beer and that he remained in the cafe waiting for a bus to go home.³ Further evidence showed without dispute that at the time of his arrest petitioner gave the officers his home address; that he had money with him, and a bus schedule showing that a bus to his home would stop within half a block of the cafe at about 7:30; that he owned two unimproved lots of land; that in addition to work he had done for others, he had regularly worked one day or more a week for the same family for 30 years; that he paid no rent in the home where he lived and that his meager income was sufficient to meet his needs. The cafe manager testified that petitioner had frequently patronized the cafe, and that he had never told petitioner that he was unwelcome there. The manager further testified that on this very occasion he saw petitioner "standing there in the middle of the floor and patting his foot," and that he did not at any time during petitioner's stay there object to anything he was doing. There is no evidence that anyone else in the cafe objected to petitioner's shuffling his feet in rhythm with the music of the juke box or that his conduct was boisterous or offensive to anyone present. At the close of his evidence, petitioner repeated his motion for dismissal of the charges on the ground that a conviction on the foregoing evidence would deprive him of liberty and property without due process under the Fourteenth Amendment. The court denied the motion, convicted him of both offenses, and fined him \$10 on each charge. A motion for new trial, on the same grounds, also was denied, which exhausted petitioner's remedies in the police court.

1. Upon conviction and sentence under §§ 85-8, 85-12 and 85-13 of the ordinances of the City of Louisville, petitioner would be subject to imprisonment, fine or confinement in the workhouse upon default of payment of a fine.

2. Petitioner added that the effect of conviction here would be to deny him redress for the prior alleged arbitrary and unlawful arrests. This was based on the fact that, under Kentucky law, conviction bars suits for malicious prosecution and even for false imprisonment. Thus, petitioner says, he is subject to arbitrary and continued arrests neither reviewable by regular appellate procedures nor subject to challenge in independent civil actions.

3. The officer's previous testimony that petitioner had bought no food or drink is seriously undermined, if not contradicted, by the manager's testimony at trial. There the manager stated that the officer "asked me I had [sic] sold him any thing to eat and I said no and he said any beer and I said no * * *." (Emphasis supplied.) And the manager acknowledged that petitioner might have bought something and been served by a waiter or waitress without the manager noticing it. Whether there was a purchase or not, however, is of no significance to the issue here.

[Stay of Judgment]

Since police court fines of less than \$20 on a single charge are not appealable or otherwise reviewable in any other Kentucky court,⁴ petitioner asked the police court to stay the judgments so that he might have an opportunity to apply for certiorari to this Court (before his case became moot)⁵ to review the due process contentions he raised. The police court suspended judgment for 24 hours during which time petitioner sought a longer stay from the Kentucky Circuit Court. That court, after examining the police court's judgments and transcript, granted a stay concluding that "there appears to be merit" in the contention that "there is no evidence upon which conviction and sentence by the Police Court could be based" and that petitioner's "Federal Constitutional claims are substantial and not frivolous."⁶ On appeal by the city, the Kentucky Court of Appeals held that the Circuit Court lacked the power to grant the stay it did, but nevertheless went on to take the extraordinary step of granting its own stay, even though petitioner had made no original application to that court for such a stay.⁷ Explaining its reason, the Court of Appeals took occasion to agree with the Circuit Court that petitioner's "federal constitutional claims are substantial and not frivolous."⁸ The Court of Appeals then went on to say that petitioner

"appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, yet this substantive right can not be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. Appellee's substantive right of due process is of

no avail to him unless this court grants him the ancillary right whereby he may test same in the Supreme Court."⁹

[Substantial Due Process Questions]

Our examination of the record presented in the petition for certiorari convinced us that although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari to review the police court's judgments. 360 U.S. 916, 79 S.Ct. 1433, 3 L.Ed.2d 1532. Compare *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (San Francisco Police Judges Court judgment imposing a \$10 fine, upheld by state appellate court, reversed as in contravention of the Fourteenth Amendment).

The city correctly assumes here that if there is no support for these convictions in the record they are void as denials of due process.¹⁰ The pertinent portion of the city ordinance under which petitioner was convicted of loitering reads as follows:

"It shall be unlawful for any person * * *, without visible means of support, or who cannot give a satisfactory account of himself, * * * to sleep, lie, loaf, or trespass in or about any premises, building, or other structure in the City of Louisville, without first having obtained the consent of the owner or controller of said premises, structure, or building; * * * " § 85-12, Ordinances of the City of Louisville.¹¹

In addition to the fact that petitioner proved he had "visible means of support," the prosecutor at trial said "This is a loitering charge here. There is no charge of no visible means of support." Moreover, there is no suggestion that petitioner was sleeping, lying or trespassing in or about this cafe. Accordingly he could only have been convicted for being unable to give a satisfactory account of himself while loitering in the cafe, without the consent of the manager. Under the words of the ordinance itself, if the evidence fails to prove all three elements of

4. Ky.Rev.Stat. § 26.080; and see § 26.010. Both the Jefferson Circuit Court and the Kentucky Court of Appeals held that further review by direct appeal or by collateral proceeding was foreclosed to petitioner. *Thompson v. Taustine*, No. 40175, Jefferson (Kentucky) Circuit Court, Common Pleas Branch, Fifth Division (Per Grauman, J.) (1959), unreported; *Taustine v. Thompson*, Ky. 1959, 322 S.W.2d 100.

5. Without a stay and bail pending application for review petitioner would have served out his fines in prison in 10 days at the rate of \$2 a day. *Taustine v. Thompson*, Ky. 1959, 322 S.W.2d 100.

6. *Thompson v. Taustine*, No. 40175, Jefferson (Kentucky) Circuit Court, Common Pleas Branch, Fifth Division (per Grauman, J.) (1959), unreported.

7. *Taustine v. Thompson*, Ky. 1959, 322 S.W.2d 100.

8. *Id.*, 322 S.W.2d at page 101.

9. *Id.*, 322 S.W.2d at page 102.

10. For illustration, the city's brief in this Court states that the questions presented are "(1) Whether the evidence was sufficient to support the convictions, and therefore meets the requirements of the due process clause of the Fourteenth Amendment. * * *

11. Section 85-13 provides penalties for violation of § 85-12.

this loitering charge, the conviction is not supported by evidence, in which event it does not comport with due process of law. The record is entirely lacking in evidence to support any of the charges.

Here, petitioner spent about half an hour on a Saturday evening in January in a public cafe which sold food and beer to the public. When asked to account for his presence there, he said he was waiting for a bus. The city concedes that there is no law making it an offense for a person in such a cafe to "dance," "shuffle" or "pat" his feet in time to music. The undisputed testimony of the manager, who did not know whether petitioner had bought macaroni and beer or not but who did see the patting, shuffling or dancing, was that petitioner was welcome there. The manager testified that he did not, at any time during petitioner's stay in the cafe, object to anything petitioner was doing and that he never saw petitioner do anything that would cause any objection. Surely this is implied consent, which the city admitted in oral argument satisfies the ordinance. The arresting officer admitted that there was nothing in any way "vulgar" about what he called petitioner's "ordinary dance," whatever relevance, if any, vulgarity might have to a charge of loitering. There simply is no semblance of evidence from which any person could reasonably infer that petitioner could not give a satisfactory account of himself or that he was loitering or loafing there (in the ordinary sense of the words) without "the consent of the owner or controller" of the cafe.

[The Disorderly Conduct Charge]

Petitioner's conviction for disorderly conduct was under § 85-8 of the city ordinance which, without definition, provides that "whoever shall be found guilty of disorderly conduct in the City of Louisville shall be fined * * ." etc. The only evidence of "disorderly conduct" was the single statement of the policeman that after petitioner was arrested and taken out of the cafe he was very argumentative. There is no testi-

mony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good order and tranquillity of the City of Louisville. The only information the record contains on what the petitioner was "argumentative" about is his statement that he asked the officers "what they arrested me for." We assume, for we are justified in assuming, that merely "arguing" with a policeman is not, because it could not be, "disorderly conduct" as a matter of the substantive law of Kentucky. See *Lanzetta v. State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888. Moreover, Kentucky law itself seems to provide that if a man wrongfully arrested fails to object to the arresting officer, he waives any right to complain later that the arrest was unlawful. *Nickell v. Commonwealth, Ky.*, 285 S.W.2d 495, 496.

[Insufficient Evidence for Conviction]

Thus we find no evidence whatever in the record to support these convictions. Just as "Conviction upon a charge not made would be sheer denial of due process,"¹² so is it a violation of due process to convict and punish a man without evidence of his guilt.¹³

The judgments are reversed and the cause is remanded to the Police Court of the City of Louisville for proceedings not inconsistent with this opinion.

Reversed and remanded.

12. *De Jonge v. State of Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278. See also *Cole v. State of Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644.
13. See *Schwartz v. Board of Bar Examiners of State of N. M.*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; *United States ex rel. Vajtauer v. Commissioner of Immigration of Port of New York*, 273 U.S. 103, 106, 47 S.Ct. 302, 303, 71 L.Ed. 560; *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543; *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. Cf. *Akins v. State of Texas*, 325 U.S. 398, 402, 65 S.Ct. 1276, 1278, 89 L.Ed. 1692; *Tot v. United States*, 319 U.S. 463, 473, 63 S.Ct. 1241, 1247, 87 L.Ed. 1519 (concurring opinion); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.

ELECTIONS

Registration—Federal Statutes

UNITED STATES of America v. Curtis M. THOMAS, registrar of voters of Washington Parish, Louisiana.

United States Supreme Court, January 26, 1960, 80 S.Ct. 398.

SUMMARY: A federal district court in Louisiana enjoined a parish registrar of voters from allowing a number of vote challenges. (See 5 Race Rel. L. Rep. 112, *infra*). The registrar applied to the United States Court of Appeals for the Fifth Circuit for an order staying the enforcement of the decree pending determination of an appeal. (5 Race Rel. L. Rep. 114). The Solicitor General of the United States applied to the United States Supreme Court for an order vacating the stay. The Supreme Court then agreed to grant certiorari, since the issues appeared to coincide with those in *United States v. Raines*, 172 F.Supp. 552, 4 Race Rel. L. Rep. 314 (M.D. Ga. 1959); 79 S.Ct. 1448, 4 Race Rel. L. Rep. 255 (1959). [Later, on February 29, this order was vacated and the district court judgment affirmed on the basis of the *Raines* case, below. See 80 S. Ct. 612.]

On application to vacate order of the Court of Appeals granting stay of injunction pending appeal and to reinstate injunction issued by the District Court.

Jan. 26, 1960. PER CURIAM. The application of the United States for an order vacating the stay order of the Court of Appeals entered January 21, 1960, and reinstating the decree of the District Court, together with the request of the Attorney General of Louisiana for argument thereon, have been considered by the Court.

1. It appears, as respondents pointed out in their application to the Court of Appeals for the stay herein, that the issues in *United States v. Raines*, No. 64, now pending on appeal in this Court, are pertinent to the disposition of this case. In view of this, and of the fact that the issues raised by this application are closely related to those involved on the merits of the controversy now before the Court of Appeals, the Court believes that the entire matter should be considered at one time. In light of the fore-

going, and of the imminence of the State general election scheduled for April 19, 1960, the Court will entertain a petition for certiorari to review the judgment of the District Court, 28 U.S.C. §§ 1254(1), 2101(e), if filed by the Solicitor General on or before January 29, 1960. The petition may be filed in typewritten form. See the action of the Court as to *Bolling v. Sharpe*, 344 U.S. at p. 3, 73 S.Ct. at p. 2.

2. In the event that such a petition is so filed, the Court will hear argument upon the present application, the petition, and the merits, on February 23, 1960, the case to be set at the head of the calendar for that day. See *Hannah v. Larche*, 80 S.Ct. 263; *Hannah v. Slawson*, No. 550, 361 U.S.—, 80 S.Ct. 263.

3. The record, which may be filed in typewritten form, and the Government's brief on all matters will be filed on or before February 10, 1960, and the answering briefs of the respondents will be filed on or before February 20, 1960. The Government may file a reply brief on or before February 22, 1960.

ELECTIONS

Registration—Federal Statutes

UNITED STATES v. James Griggs RAINES et al.

United States Supreme Court, February 29, 1960, 80 S.Ct. 519.

SUMMARY: The United States brought an action in federal court to enjoin Georgia voting officials from depriving certain persons of voting rights because of their race or color, in violation of the 1957 Civil Rights Act. The court agreed with defendants that the statute is not "appropriate legislation" under the Fifteenth Amendment and exceeds the jurisdiction of Congress because it allows the United States Attorney General to seek an injunction against

a private citizen for an individual act, divorced completely from state action. Therefore the court held that Section 1971(c) of Title 42 is unconstitutional because it authorizes invalid action, and the motion to dismiss must be granted even though the complaint here is based on acts done by state officers in their official capacity. 172 F.Supp. 552, 4 Race Rel. L. Rep. 314 (1959). On direct appeal by the government, the United States Supreme Court reversed the judgment, invoking rules that: federal courts have no jurisdiction to pronounce a statute unconstitutional unless required in adjudging rights of litigants in actual controversies; a question of constitutional law is not to be anticipated in advance of the necessity of deciding it; the formulation of a constitutional law rule must not be broader than required by the precise facts to which it is to be applied; and one to whom application of a statute is constitutional will not be heard to attack it because impliedly it might also be unconstitutional in application to other persons or situations. Since here the district court apparently recognized that the complaint charged discriminatory state action in violation of the Fifteenth Amendment and of the statute, and that the statute as applied to this class of cases is valid as appropriate legislation under the Fifteenth Amendment, the Supreme Court held that the Act's application herein should have been sustained without reference to imagined hypothetical cases. The argument that defendants' actions could not be ascribed to the state, as the parties allegedly aggrieved thereby had not exhausted remedies through which higher state authority might have revised such conduct, was rejected by the court because in the Act Congress validly authorizes district court jurisdiction without regard to whether other remedies have been exhausted. The court also overruled the contention that it was beyond Congress' power to authorize the United States to bring an action in support of private constitutional rights, holding that "there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear most directly on private rights."

Mr. Justice BRENNAN delivered the opinion of the Court.

The United States brought this action in the District Court for Middle Georgia against the members of the Board of Registrars and certain Deputy Registrars of Terrell County, Georgia. Its complaint charged that the defendants had through various devices, in the administration of their offices, discriminated on racial grounds against Negroes who desired to register to vote in elections conducted in the State. The complaint sought an injunction against the continuation of these discriminatory practices, and other relief.

The action was founded upon R.S. § 2004, as amended by § 131 of the Civil Rights Act of 1957, 71 Stat. 637, 42 U.S.C. § 1971, 42 U.S.C.A. § 1971. Subsections (a) and (c) which are directly involved, provide:¹

"(a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State,

Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

• • • • •
 "(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) • • • • •, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. • • •"

[Provision Held Invalid Below]

On the defendants' motion, the District Court dismissed the complaint, holding that subsection (c) was unconstitutional. 172 F.Supp. 552. The Court held that the statutory language quoted

1. Subsection (a) was originally § 1 of the Enforcement Act of May 31, 1870, c. 114, 16 Stat. 140, and was brought forward as R.S. § 2004. The remaining subsections were added by the 1957 legislation. Subsection (b) forbids various forms of intimidation and coercion in respect of voting for federal elective officers, and the enforcement provisions of subsection (c) likewise apply to it; but subsection (b) is not involved in this litigation.

allowed the United States to enjoin purely private action designed to deprive citizens of the right to vote on account of their race or color. Although the complaint in question involved only official action, the court ruled that since, in its opinion, the statute on its face was susceptible of application beyond the scope permissible under the Fifteenth Amendment, it was to be considered unconstitutional in all its applications. The Government appealed directly to this Court and we postponed the question of jurisdiction to the hearing of the case on the merits. 360 U.S. 926, 79 S.Ct. 1448, 3 L.Ed.2d 1541. Under the terms of 28 U.S.C. § 1252, 28 U.S.C.A. § 1252, the case is properly here on appeal since the basis of the decision below in fact was that the Act of Congress was unconstitutional, no matter what the contentions of the parties might be as to what its proper basis should have been.

[Foundation of Judicial Review]

The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power—"the gravest and most delicate duty that this Court is called on to perform."² *Marbury v. Madison*, 1 Cranch 137, 177-180, 2 L.Ed. 60. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might

be unconstitutional. *United States v. Wurzbach*, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508; *Heald v. District of Columbia*, 259 U.S. 114, 123, 42 S.Ct. 434, 435, 66 L.Ed. 852; *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 33 S.Ct. 40, 57 L.Ed. 193; *Collins v. State of Texas*, 223 U.S. 288, 295-296, 32 S.Ct. 286, 288, 56 L.Ed. 439; *People of State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160-161, 27 S.Ct. 188, 190-191, 51 L.Ed. 415. Cf. *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 537, 61 S.Ct. 376, 379, 85 L.Ed. 322; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513, 57 S.Ct. 868, 874, 81 L.Ed. 1245; *Virginian R. Co. v. System Federation*, 300 U.S. 515, 558, 57 S.Ct. 592, 605, 81 L.Ed. 789; *Blackmer v. United States*, 284 U.S. 421, 442, 52 S.Ct. 252, 257, 76 L.Ed. 375; *Roberts & Schaefer Co. v. Emmerson*, 271 U.S. 50, 54-55, 46 S.Ct. 375, 376-377, 70 L.Ed. 827; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576, 35 S.Ct. 167, 169, 59 L.Ed. 364; *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 21 S.Ct. 206, 45 L.Ed. 252; *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347-348, 56 S.Ct. 466, 483-484, 80 L.Ed. 688 (concurring opinion). In *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, this Court developed various reasons for this rule. Very significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive litigation." *Id.*, 346 U.S. at page 256, 73 S.Ct. at page 1035. The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined. The Court further pointed to the fact that a limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were in fact concretely presented. We might add that application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but from premature interpretations of statutes in areas where their constitutional application might be cloudy.

[Exceptional Cases]

The District Court relied on, and appellees urge here, certain cases which are said to be inconsistent with this rule and with its closely related corollary that a litigant may only assert

2. *Holmes, J.*, in *Blodgett v. Holden*, 275 U.S. 142, 148, 276 U.S. 594, 48 S.Ct. 105, 107, 72 L.Ed. 206.

his own constitutional rights or immunities. In many of their applications, these are not principles ordained by the Constitution, but constitute rather "rule of practice," *Barrows v. Jackson*, supra, 346 U.S. at page 257, 73 S.Ct. at page 1035, albeit weighty ones; hence some exceptions to them where there are weighty countervailing policies have been and are recognized. For example, where as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and he has no effective way to preserve them himself, the Court may consider those rights as before it. *N. A. A. C. P. v. State of Alabama*, 357 U.S. 449, 459-460, 78 S.Ct. 1163, 1170-1171, 2 L.Ed.2d 1488; *Barrows v. Jackson*, supra. This Court has indicated that where the application of these rules would itself have an inhibitory effect on freedom of speech, they may not be applied. See *Smith v. People of State of California*, 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205; *Thornhill v. State of Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093. Perhaps cases can be put where their application to a criminal statute would necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited. See *United States v. Reese*, 92 U.S. 214, 219-220, 23 L.Ed. 563; cf. *Winters v. People of State of New York*, 333 U.S. 507, 518-520, 68 S.Ct. 665, 671-672, 92 L.Ed. 840. And the rules' rationale may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover. See *Butts v. Merchants & Miners Transportation Co.*, 230 U.S. 126, 33 S.Ct. 964, 57 L.Ed. 1422. The same situation is presented when a state statute comes conclusively pronounced by a state court as having an otherwise valid provision or application inextricably tied up with an invalid one, see *Dorchy v. State of Kansas*, 264 U.S. 286, 290, 44 S.Ct. 323, 325, 68 L.Ed. 686;³ or possibly in that rarest of cases where this Court can justifiably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application. Cf. *The Trade-Mark Cases*, 100 U.S. 82, 97-98, 25 L.Ed. 550; *The Employers' Liability Cases*, 207 U.S. 463, 501, 28 S.Ct. 141, 146, 52 L.Ed.

297. But we see none of the countervailing considerations suggested by these examples, or any other countervailing consideration, as warranting the District Court's action here in considering the constitutionality of the Act in applications not before it.⁴ This case is rather the most typical one for application of the rules we have discussed.

[Inconsistent Applications Admitted]

There are, to be sure, cases where this Court has not applied with perfect consistency these rules for avoiding unnecessary constitutional determinations,⁵ and we do not mean to say that every case we have cited for various exceptions to their application was considered to turn on the exception stated, or is perfectly justified by it. The District Court relied primarily on *United States v. Reese*, supra. As we have indicated, that decision may have drawn support from the assumption that if the Court had not passed on the statute's validity *in toto* it would have left standing a criminal statute incapable of giving

3. Cf. *Mountain Timber Co. v. State of Washington*, 243 U.S. 219, 234, 37 S.Ct. 260, 263, 61 L.Ed. 685. But a State's determination of the class of persons who can invoke the protection of provisions of the Federal Constitution has been held not conclusive here. *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603.

4. Certainly it cannot be said that the sort of action proceeded against here, and validly reachable under the Constitution (see at pages 524-526 of 80 S.Ct. *infra*), was so small and inessential a part of the evil Congress was concerned about in the statute that these defendants should be permitted to make an attack on the statute generally. Subsection (d) and innumerable items in the legislative history show Congress' particular concern with the sort of action charged here. See, e. g., Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, on Proposals to Secure, Protect, and Strengthen Civil Rights of Persons under the Constitution and Laws of the United States, 85th Cong., 1st Sess., pp. 4-7, 36-37, 77, 81, 189, 205, 293, 300; Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives on Miscellaneous Bills Regarding the Civil Rights of Persons within the Jurisdiction of the United States, 85th Cong., 1st Sess., pp. 656, 1220; 103 Cong.Rec. 8705, 12149, 12898, 13126, 13732.

Nor can there be any serious contention that the statute, as a civil enactment, would fail to give adequate notice of the conduct it validly proscribed, even if certain applications of it were to be deemed to be unconstitutional. Criminal proceedings under the statute must depend on violation of a restraining order embracing the party charged.

5. Cf., e. g., *Illinois Central R. Co. v. McKendree*, 203 U.S. 514, 27 S.Ct. 153, 51 L.Ed. 298; *United States v. Ju Toy*, 198 U.S. 253, 262-263, 25 S.Ct. 644, 646-647, 49 L.Ed. 1040.

fair warning of its prohibitions. But to the extent Reese did depend on an approach inconsistent to what we think the better one and the one established by the weightiest of the subsequent cases, we cannot follow it here.

[Application to This Case]

Accordingly, if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality. And as to the application of the statute called for by the complaint, whatever precisely may be the reach of the Fifteenth Amendment, it is enough to say that the conduct charged—discrimination by state officials, within the course of their official duties, against the voting rights of United States citizens, on grounds of race or color—is certainly, as “state action” and the clearest form of it, subject to the ban of that Amendment, and that legislation designed to deal with such discrimination is “appropriate legislation” under it. It makes no difference that the discrimination in question, if state action, is also violative of state law. *Snowden v. Hughes*, 321 U.S. 1, 11, 64 S.Ct. 397, 403, 88 L.Ed. 497. The appellees contend that since Congress has provided in subsection (d) of the statutory provision in question here that the District Courts shall exercise their jurisdiction “without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law,” and such remedies were not exhausted here, appellees’ action cannot be ascribed to the State. The argument is that the ultimate voice of the State has not spoken, since higher echelons of authority in the State might revise the appellees’ action. It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. See *Cooper v. Aaron*, 358 U.S. 1, 16-19, 78 S.Ct. 1401, 1408-1410, 3 L.Ed.2d 5. We think this Court has already made it clear that it follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions. The appellees can draw no support from the expressions in *Barney v. City of New York*, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737, on which they so much rely.⁶ The authority

of those expressions has been “so restricted by our later decisions,” see *Snowden v. Hughes*, supra, 321 U.S. at page 13, 64 S.Ct. at page 403, that Barney must be regarded as having “been worn away by the erosion of time,” *Tigner v. State of Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124, and of contrary authority. See *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 37, 28 S.Ct. 7, 13, 52 L.Ed. 78; *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 283-289, 294, 33 S.Ct. 312, 313-315, 317, 57 L.Ed. 510; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 247, 52 S.Ct. 133, 136, 76 L.Ed. 265; *Snowden v. Hughes*, supra; *Screws v. United States*, 325 U.S. 91, 107-113, 116, 65 S.Ct. 1031, 1038-1041, 1043, 89 L.Ed. 1495. Cf. *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368. It was said of Barney’s doctrine in *Home Telephone & Telegraph Co. v. City of Los Angeles*, supra, 227 U.S. at page 284, 33 S.Ct. at page 314, by Mr. Chief Justice White: “[its] enforcement . . . would . . . render impossible the performance of the duty with which the Federal courts are charged under the Constitution.” The District Court seems to us to have recognized that the complaint clearly charged a violation of the Fifteenth Amendment and of the statute, and that the statute, if applicable only to this class of cases, would unquestionably be valid legislation under that Amendment. We think that under the rules we have stated, that court should then have gone no further and should have upheld the Act as applied in the present action, and that its dismissal of the complaint was error.

[Alternative Grounds Urged]

The appellees urge alternative grounds on which they seek to support the judgment of the

6. Barney was a property owner’s action to enjoin state officials from construction of a rapid transit tunnel in a particular place. The suit was brought directly under the Fourteenth Amendment in federal court, and it was averred that the proposed action of the state officials was not authorized under state law. It does not appear that the complainant alleged that higher state administrative echelons were indisposed to halt the unauthorized actions or that the State offered no remedy at all to a property owner threatened with interference with his property by state officials acting without authority. There was not presented any specific federal statute expressly authorizing federal judicial intervention with matters in this posture.

District Court dismissing the complaint.⁷ We do not believe these grounds are well taken. It is urged that it is beyond the power of Congress to authorize the United States to bring this action in support of private constitutional rights. But there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief. See *United Steelworkers of America v. United States*, 361 U.S. 39, 43, 80 S.Ct. 1, 4, 4 L.Ed.2d 12, and cases cited. Appellees raise questions as to the scope of the equitable discretion reserved to the courts in suits under § 2004. Cf. *Id.*, 361 U.S. at pages 41-42, 80 S.Ct. at pages 3-4. We need not define the scope of the discretion of a District Court in proceedings of this nature, because, exercising a traditional equity discretion, the court below declined to dismiss the complaint on that ground, and we do not discern any basis in the present posture of the case for any con-

7. Many of these contentions are raised by what appellees style a "cross-appeal." Notice of cross-appeal was filed in the District Court, but the cross-appeal was not docketed here. However, since the judgment of the District Court awarded appellees all the relief they requested (despite rejecting most of their contentions, except the central one), no cross-appeal was necessary to bring these contentions before us if they can be considered otherwise. They would simply be alternative grounds on which the judgment below could be supported. In view of the broad nature of § 1252, which seems to indicate a desire of Congress that the whole case come up (contrast 18 U.S.C. § 3731, 18 U.S.C.A. § 3731, *United States v. Borden Co.*, 308 U.S. 188, 193, 60 S.Ct. 182, 186, 84 L.Ed. 181), we have the power to pass on these other questions, and since the District Court expressed its views on most of them, we also deem it appropriate to do so.

tention that it has abused its discretion. Questions as to the relief sought by the United States are posed, but remedial issues are hardly properly presented at this stage in the litigation.

The parties have engaged in much discussion concerning the ultimate scope in which Congress intended this legislation to apply, and concerning its constitutionality under the Fifteenth Amendment in these various applications. We shall not compound the error we have found in the District Court's judgment by intimating any views on either matter.

Reversed.

Concurring Opinion

Mr. Justice FRANKFURTER, with whom Mr. Justice HARLAN concurs, joining in the judgment.

The weighty presumptive validity with which the Civil Rights Act of 1957, like every enactment of Congress, comes here is not overborne by any claim urged against it. To deal with legislation so as to find unconstitutionality is to reverse the duty of courts to apply a statute so as to save it. Here this measure is sustained under familiar principles of constitutional law. Nor is there any procedural hurdle left to be cleared to sustain the suit of the United States. Whatever may have been the original force of *Barney v. City of New York*, 193 U.S. 430, 24 S.Ct. 502, 48 L.Ed. 737, that decision has long ceased to be an obstruction, nor is any other decision in the way of our result in this case. And so I find it needless to canvass the multitude of opinions that may generally touch on, but do not govern, the issues now before us.

INDIANS

Indian Lands—New York

FEDERAL POWER COMMISSION v. TUSCARORA INDIAN NATION. POWER AUTHORITY OF STATE OF NEW YORK v. TUSCARORA INDIAN NATION.

United States Supreme Court, March 7, 1960, 80 S.Ct. 543.

SUMMARY: The Tuscarora Indian Nation, in April, 1958, brought an action in federal court in New York, seeking an injunction and a declaratory judgment against the appropriation of tribal lands by the State Power Authority. After a grant of a temporary injunction and a change of venue to the western district of New York, *Tuscarora Nation of Indians v. Power*

Authority of the State of New York, 161 F.Supp. 702, 3 Race Rel. L. Rep. 715 (S.D. N.Y. 1958), the complaint was dismissed on the ground that if the fee to the lands was privately held, it was subject to the state's power of eminent domain, and the amount of compensation should be fixed by a New York court. 164 F.Supp. 107, 3 Race Rel. L. Rep. 1021 (W.D. N.Y. 1958). On appeal, the United States Court of Appeals for the Second Circuit held that the exercise of eminent domain must be by the United States through Congress, whose authorization for the taking could be inferred from the size of the Niagara Power Project and its proximity to appellants' reservation. But since Congress had empowered the Authority to act only through judicial proceedings in state or federal district courts, it was held that the taking could not be made under a state law permitting appropriation and eviction without judicial proceedings. The district court judgment dismissing the complaint, and thereby preventing a declaration of rights, was reversed. 257 F.2d 885 (2d Cir. 1958); *execution of mandate stayed*, 79 S.Ct. 4, 3 Race Rel. L. Rep. 1122 (1958); *certiorari denied*, 79 S.Ct. 66, 3 Race Rel. L. Rep. 1132 (1958); *rehearing denied*, 79 S.Ct. 1431, 4 Race Rel. L. Rep. 252 (1959); *appeal pending sub nom. Johnson v. Tuscarora Nation of Indians*, order: 80 S.Ct. 50, 4 Race Rel. L. Rep. 540 (1959). Meanwhile, the Indian nation petitioned the United States Court of Appeals for the District of Columbia Circuit to review the order of the Federal Power Commission issuing the license to the Authority for the project. That court ultimately remanded the case to the Commission for amendment of the licensing order to exclude condemnation of Indian land, because the Commission could not make the finding required by the Federal Power Act that a license to construct a reservoir within the reservation would not "interfere or be inconsistent with the purpose for which such reservation was created or acquired." 265 F.2d 338, 4 Race Rel. L. Rep. 344 (1959). The United States Supreme Court granted certiorari [79 S.Ct. 1435, 1437, 4 Race Rel. L. Rep. 252 (1959)] and reversed, three justices dissenting. From the wording and legislative history of the Federal Power Act's definition of "reservations," the court concluded that Congress intended the term to have an "artificial" meaning in this Act, so as to embrace only "lands and interests in lands owned by the United States." Inasmuch as no interest in the Indian lands involved is owned by the United States, the court held that the Commission was not required by the Act to make the finding in question before it issued the license herein. The Indian nation had argued that its lands are not subject to the Act's provision authorizing the licensee to condemn "the lands or property of others necessary to the construction, maintenance, or operation of any" licensed project because, this being a general Act of Congress, it does not apply to Indians unless a clear intent to include them is clearly manifested. But the court applied the well-settled rule that a general statute in terms applying to all persons includes Indians and their property interests; it also construed the Federal Power Act as giving "every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians." The Indian nation further argued, however, that even if its lands are embraced by this Act, they still may not be taken for public use without Congress' express consent referring specifically to those lands, because of a provision in an earlier federal statute that no conveyance of lands from an Indian nation would be valid unless made by treaty or convention entered into pursuant to the Constitution. The court held that statute inapplicable to the United States or to its licensees, because a general statute imposing restrictions does not apply to the government itself without a clear expression or implication to that effect. [Petition for rehearing denied 80 S.Ct. 858, 5 Race Rel. L. Rep. 41, *infra* (1960)].

Mr. Justice WHITTAKER delivered the opinion of the Court.

The ultimate question presented by these cases is whether certain lands, purchased and owned in fee simple by the Tuscarora Indian Nation and lying adjacent to a natural power site on the Niagara River near the town of Lewiston, New York, may be taken for the stor-

age reservoir of a hydroelectric power project, upon the payment of just compensation, by the Power Authority of the State of New York under a license issued to it by the Federal Power Commission as directed by Congress in Public Law 85-159, approved August 21, 1957. 71 Stat. 401, 16 U.S.C.A. §§ 836, 836a.

The Niagara River, an international boundary

stream and a navigable waterway of the United States, flows from Lake Erie to Lake Ontario, a distance of 36 miles. Its mean flow is about 200,000 cubic feet per second. The river drops about 165 feet at Niagara Falls and an additional 140 feet in the rapids immediately above and below the falls. The "head" created by these great falls, combined with the large and steady flow of the river, make the Lewiston power site, located below the rapids, an extremely favorable one for hydroelectric development.

[*American-Canadian Treaty*]

For the purpose of avoiding "continuing waste of a great natural resource and to make it possible for the United States and Canada to develop, for the benefit of their respective peoples, equal shares of the waters of the Niagara River available for power purposes," the United States and Canada entered into the Treaty of February 27, 1950,¹ providing for a flow of 100,000 cubic feet per second over Niagara Falls during certain specified daytime and evening hours of the tourist season (April 1 to October 31) and of 50,000 cubic feet per second at other times, and authorizing the equal division by the United States and Canada of all excess waters for power purposes.²

In consenting to the 1950 Treaty, the Senate imposed the condition that "no project for re-development of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress." 1 U.S.T. 644, 699. To that end, a study was made and reported to Congress in 1951 by the United States Army Corps of Engineers respecting the most feasible plans for utilizing all of the waters available to the United States under the 1950 Treaty, and detailed plans embodying other studies were prepared and submitted to Congress prior to

June 7, 1956, by the Bureau of Power of the Federal Power Commission, the Power Authority of New York, and the Niagara Mohawk Power Corporation.³ To enable utilization of all of the United States share of the Niagara waters by avoiding waste of the night- and week-end flow that would not be needed at those times for the generation of power, all of the studies and plans provided for a pumping-generating plant to lift those waters at those times into a reservoir, and for a storage reservoir to contain them until released for use—through the pumping-generating plant, when its motors (operating in reverse) would serve as generators—during the daytime hours when the demand for power would be highest and the diversion of waters from the river would be most restricted by the treaty. Estimates of dependable capacity of the several recommended projects varied from 1,240,000 to 1,723,000 kilowatts, and estimates of the needed reservoir capacity varied from 22,000 acre-feet covering 850 acres to 41,000 acre-feet covering 1,700 acres. The variations in these estimates were largely due to differing assumptions as to the length of the daily period of peak demand.

Although there was "no controversy as to the most desirable engineering plan of development,"⁴ there was serious disagreement in Congress over whether the project should be publicly or privately developed and over marketing preferences and other matters of policy. That disagreement continued through eight sessions of Committee Hearings, during which more than 30 proposed bills were considered, in the Eighty-first to Eighty-fifth Congresses,⁵ and delayed congressional authorization of the project for seven years.

3. S.Rep. No. 539, 85th Cong., 1st Sess., pp. 5-6.

4. *Ibid.*

5. Hearings were held before the Senate Committee on Public Works, or a Subcommittee, in the Eighty-second, Eighty-third and Eighty-fourth Congresses, and in the first session of the Eighty-fifth Congress; before the House Committee on Public Works in the first sessions of the Eighty-first and Eighty-second Congresses, and in the first and second sessions of the Eighty-fourth Congress. Joint hearings were held by the House Committee and a Subcommittee of the Senate Committee in the Eighty-third Congress, first session. Reports on these bills were S.Rep. No. 2501, 83d Cong., 2d Sess.; H.R.Rep. No. 713, 83d Cong., 1st Sess.; S.Rep. No. 1408, 84th Cong., 2d Sess.; H.R.Rep. No. 2635, 84th Cong., 2d Sess. The Committee Reports on the bill which was finally enacted were S.Rep. No. 439, 85th Cong., 1st Sess.; H.R.Rep. No. 862, 85th Cong., 1st Sess.

1. 1 U.S.T. 694.

2. The excess flow of water available for power purposes under the 1950 Treaty was estimated to fluctuate between 44,000 and 210,000 cubic feet per second, depending on the flow, the time of year, and the time of day. S.Rep. No. 539, 85th Cong., 1st Sess., p.4.

The 1950 Treaty superseded the Boundary Waters Treaty of 1909 (Treaty Series 548, 36 Stat. 2448) which limited diversions of water by Canada to 36,000, and by the United States to 20,000, cubic feet per second. Beginning in 1921, the waters available to the United States under that treaty were utilized by Niagara Mohawk Power Corporation in its Schoellkopf hydroelectric plant, under a federal license expiring in 1971. The rated capacity of that plant was 360,000 kilowatts.

[Plant Destroyed]

On June 7, 1956, a rock slide destroyed the Schoellkopf plant.⁶ This created a critical shortage of electric power in the Niagara community. It also required expansion of the plans for the Niagara project if the 20,000 cubic feet per second of water that had been reserved for the Schoellkopf plant was to be utilized. Accordingly, the Power Authority of New York prepared and submitted to Congress a major revision of the project plans. Those revised plans, designed to utilize all of the Niagara waters available to the United States under the 1950 Treaty, provided for an installed capacity of 2,190,000 kilowatts, of which 1,800,000 kilowatts would be dependable power for 17 hours per day, necessitating a storage reservoir of 60,000 acre-feet capacity covering about 2,800 acres.⁷

Confronted with the destruction of the Schoellkopf plant and the consequent critical need for electric power in the Niagara community, Congress speedily composed its differences in the manner and terms prescribed in Public Law 85-159, approved August 21, 1957. 71 Stat. 401. By § 1(a) of that Act, Congress "expressly authorized and directed" the Federal Power Commission "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." By § 1(b)

6. See note 2.

7. The Report of the Senate Committee on Public Works of June 27, 1957, reporting out the bill that was finally adopted, contained the following statement:

"The proposals by the Power Authority of the State of New York at present contemplate a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. They anticipate that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required." S.Rep. No. 539, 85th Cong., 1st Sess., p.5.

The Report of the House Committee on Public Works of July 23, 1957, contained the following statement:

"As a result of the [Schoellkopf] disaster, the redevelopment project will be enlarged so as to develop the water formerly utilized in the destroyed plant. The proposal now contemplates a project with a total installed capacity of 2,190,000 kilowatts. Of this 1,800,000 will constitute firm power on a 17-hour-day basis. It is anticipated that in order to achieve this amount of firm capacity, pump-storage and pumping-generating facilities will be required." H.R.Rep. No. 862, 85th Cong., 1st Sess., p. 7, U.S.Code Cong. and Adm.News 1957, p. 1591.

of the Act the Federal Power Commission was directed to "include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act," seven conditions which are of only collateral importance here.⁸ The concluding section of the Act, § 2, provides: "The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized."

[New York Power Authority]

Thereafter, the Power Authority of the State of New York, a municipal corporation created under the laws of that State to develop the St. Lawrence and Niagara power projects, applied to the Federal Power Commission for the project license which Congress had thus directed the Commission to issue to it. Its application embraced the project plans that it had submitted to the Eighty-fifth Congress shortly before its approval of Public Law 85-159.⁹ The project was scheduled to be completed in 1963 at an estimated cost of \$720,000,000.

Hearings were scheduled by the Commission,

8. Those seven conditions resolved the previously disputed issues which had so long delayed congressional authorization of the project. By those conditions, at least 50% of the project power must be made available to public bodies and nonprofit cooperatives "at the lowest rates reasonably possible," and 20% of that amount must be made available for use in neighboring States. Niagara Mohawk Power Corporation was given the right to purchase 445,000 kilowatts for a designated period to supply, and "restore low power costs to," the customers of its Schoellkopf plant, in exchange for relinquishment of its federal license. The Power Authority of New York was authorized to construct independent transmission lines to reach its preference customers and to control the resale rates of distributors purchasing power from it. The project was required to bear the United States share of the cost of remedial works in the river, and, within a designated maximum sum, the cost of a scenic drive and a park.
9. The plans embraced by the application for the license consisted, in general, of (1) the main generating plant on the east bank of the river, (2) a pumping-generating plant, located a short distance east of the main generating plant, (3) a storage reservoir, adjacent to the pumping-generating plant, having a usable storage capacity of 60,000 acre-feet, and covering about 2,800 acres, (4) a water intake structure on the east bank of the river about three miles above the falls, and (5) a water conveyance system extending from the intake to a forebay at the pumping-generating plant, and from the latter to a forebay at the main generating plant.

of which due notice was given to all interested parties, including the Tuscarora Indian Nation inasmuch as the application contemplated the taking of some of its lands for the reservoir. The Tuscarora Indian Nation intervened and objected to the taking of any of its lands upon the ground "that the applicant lacks authority to acquire them." At the hearings, it was shown that the Tuscarora lands needed for the reservoir—then thought to be about 1,000 acres—are part of a separate tract of 4,329 acres purchased in fee simple by the Tuscarora Indian Nation, with the assistance of Henry Dearborn, then Secretary of War, from the Holland Land Company on November 21, 1804, with the proceeds derived from the contemporaneous sale of their lands in North Carolina—from which they had removed in about the year 1775 to reside with the Oneidas in central New York.¹⁰

[License Granted]

After concluding the hearings, the Commission, on January 30, 1958, issued its order granting the license. It found that a reservoir having a usable storage capacity of 60,000 acre-

feet "is required to properly utilize the water resources involved." Although the Commission found that the Indian lands "are almost entirely undeveloped except for agricultural use," it did not pass upon the Tuscaroras' objection to the taking of their lands because it then assumed that "other lands are available for reservoir use if the applicant is unable to acquire the Indian lands." But the Commission did direct the licensee to revise its exhibit covering the reservoir, to more definitely show the area and acreage involved, and to resubmit it to the Commission for approval within a stated time.

In its application for rehearing, the Tuscarora Indian Nation contended, among other things, that the portion of its lands sought to be taken for the reservoir was part of a "reservation," as defined in § 3(2), and as used in § 4(e), of the Federal Power Act,¹¹ and therefore could not lawfully be taken for reservoir purposes in the absence of a finding by the Commission "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." By its order of March 21, 1958, denying that application for rehearing, the Commission found that "[t]he best location of the reservoir would require approximately 1,000 acres of land owned by Intervener," and it held that the Indian lands involved "are not part of a 'reservation' referred to in section 4(e) as defined in section 3(2) of the [Federal Power] Act, and the finding suggested by Intervener is not required." On May 5, 1958, the Commission issued its order approving the licensee's revised exhibit which precisely delineated the location, area, and acreage to be embraced by the reservoir—which included 1,383 acres of the Tuscaroras' lands.

[License Challenged]

On May 16, 1958, the Tuscarora Indian Nation filed a petition for review in the Court of Appeals for the District of Columbia Circuit challenging the license issued by the Commission on January 30, 1958, insofar as it would authorize the taking of Tuscarora lands.¹² By

10. Because the proceeds of the sale of the Tuscaroras' North Carolina lands (\$15,000) were payable in three equal annual installments and were to be used, so far as necessary, for the payment of the purchase price of the New York lands (\$13,752.80), which was also payable in three substantially equal annual installments, the latter lands were conveyed on November 21, 1804, by deed of the Holland Land Company (which acknowledged receipt of the first installment of the purchase price, and reserved a lien to secure the two unpaid installments of the purchase price) to Henry Dearborn "in Trust" for the "Tuscarora Nation of Indians and their assigns forever . . . the said Henry Dearborn and his Heirs [to] grant and convey the same in Fee Simple or otherwise to such person or persons as the said Tuscarora Nation of Indians shall at any time hereafter direct and appoint." After collection of the remaining installments of the purchase price of the Tuscaroras' North Carolina lands and, in turn, remitting to the Holland Land Company so much thereof as was necessary to pay the balance of the purchase price for the New York lands, Henry Dearborn conveyed the New York lands to the "Tuscarora Nation of Indians and their successors and assigns forever," in fee simple free and clear of encumbrances, on January 2, 1809. The Tuscarora Indian Nation has ever since continued to own those lands under that conveyance.

In addition to the 4,329 acres purchased from the Holland Land Company in 1804, the Tuscaroras' reservation embraces two other contiguous tracts containing 1,920 acres. The first, a tract of 640 acres, was ceded to the Tuscaroras by the Holland Land Company in June 1798. The second, a tract of 1,280 acres, was ceded to them by the Holland Land Company in 1799. Those tracts are not involved in this case.

11. 49 Stat. 838, as amended, 16 U.S.C. §§ 796(2) and 797(e), 16 U.S.C.A. §§ 796(2), 797(e).

12. Meanwhile, on April 15, 1958, the Power Authority of New York commenced so-called "appropriation" proceedings under § 30 of the New York State Highway Law, McKinney's Consol.Laws, c. 25, and also under Art. 5, Tit. 1, of the New York Public Authorities Laws, McKinney's Consol.Laws, c.

its opinion and interim judgment of November 14, 1958, the Court of Appeals held that the Tuscarora lands sought to be taken for the reservoir constitute a part of a "reservation" within the meaning of §§ 3(2) and 4(e) of the Federal Power Act, and that the Commission may not include those lands in the license in the absence of a § 4(e) finding that their taking "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired," and the court remanded the case to the Commission that it might "explore the possibility of making that finding." 265 F.2d 338, 343.

Upon remand, the Commission held extensive hearings, exploring not only the matter of the making of the finding held necessary by the Court of Appeals but also the possibility of locating the reservoir on other lands. In its order of February 2, 1959, the Commission found that the use of other lands for the reservoir would

result in great delay, severe community disruption, and unreasonable expense; that a reservoir with usable storage capacity of 60,000 acre-feet is required to utilize all of the United States share of the water of the Niagara River, as required by Public Law 85-159; that removal of the reservoir from the Tuscarora lands by reducing the area of the reservoir would reduce the usable storage capacity from 60,000 acre-feet to 30,000 acre-feet and result in a loss of about 300,000 kilowatts of dependable capacity. But it concluded that, although other lands contiguous to their reservation might be acquired by the Tuscaroras,¹³ the taking of the 1,383 acres of Tuscarora lands for the reservoir "would interfere and be inconsistent with the purpose for which the reservation was created or acquired." That order was transmitted to the Court of Appeals which, on March 24, 1959, after considering various motions of the parties, entered its final judgment approving the license except insofar as it would authorize the taking of Tuscarora lands for the reservoir, and remanded the case to the Commission with instructions to amend the license "to exclude specifically the power of the said Power Authority to condemn the said lands of the Tuscarora Indians for reservoir purposes." 265 F.2d at page 344.

[Important Questions]

Because of conflict between the views of the court below and those of the Second Circuit, and of the general importance of the questions involved, we granted certiorari. 360 U.S. 915, 79 S. Ct. 1435, 3 L.Ed.2d 1532.

The parties have urged upon us a number

43-A, to condemn the 1,383 acres of Tuscarora lands for reservoir use.

On April 18, 1958, the Tuscarora Indian Nation filed a complaint in the United States District Court for the Southern District of New York against the Power Authority and the Superintendent of Public Works of New York, seeking (1) a declaratory judgment that the Power Authority had no right or power to take any of its lands without the express and specific consent of the United States, and (2) a permanent injunction against the appropriation or condemnation of any of its lands. The court issued a temporary restraining order. The action, being a "local" one, was then transferred to the District Court for the Western District of New York. After hearing, that court on June 24, 1958, denied the relief prayed, dissolved the restraining order, and dismissed the complaint on the merits. *Tuscarora Nation of Indians v. Power Authority of the State of New York*, D.C., 164 F.Supp. 107.

On appeal, the Second Circuit affirmed in part and reversed in part. It held that the Power Authority was authorized under Public Law 58-159 and the Federal Power Act and by the Commission's license thereunder of January 30, 1958, to take the part of the Tuscarora lands needed for the reservoir, but that they could be taken only by a condemnation action in a state or federal court in the district where the property is located under and in the manner provided by § 21 of the Federal Power Act (16 U.S.C. § 814, 16 U.S.C.A. § 814), and not by "appropriation" proceedings under the New York laws referred to. *Tuscarora Nation of Indians v. Power Authority of the State of New York*, 2 Cir., 257 F.2d 885. The Tuscarora Indian Nation's petition to this Court for a writ of certiorari was denied on October 13, 1958. 358 U.S. 841, 79 S.Ct. 66, 3 L.Ed.2d 76. The Superintendent of Public Works of New York, a respondent in the Second Circuit proceedings, has appealed to this Court from so much of the judgment as denied a right to acquire the Tuscarora lands by appropriation proceedings under the New York laws and that appeal is now pending here. (No. 4, Oct. Term, 1959.)

13. In making the statement referred to in the text the Commission was doubtless alluding to the fact that in May 1958, the Power Authority offered the Tuscaroras \$1,500,000 for the 1,383 acres, or in excess of \$1,100 per acre, plus payment for, or removal to or replacing on other lands, the 37 houses located on these 1,383 acres and to construct for them a community center building, involving a total expenditure of about \$2,400,000, which offer, the Commission says, has never been withdrawn.

The Tuscarora Indian Nation tells us in its brief that:

"What the Government unfortunately fails to point out is that the Power Authority's 'offer' was and still is an empty gesture since, as the court below and the Court of Appeals for the Second Circuit both ruled, the Tuscarora Nation is prohibited by law from selling its lands without the consent of the United States expressed in an act of Congress. 25 U.S.C. §§ 177, 233 [25 U.S.C.A. §§ 177, 233]."

of contentions, but we think these cases turn upon the answers to two questions, namely, (1) whether the Tuscarora lands covered by the Commission's license are part of a "reservation" as defined and used in the Federal Power Act, 16 U.S.C. § 791a et seq., 16 U.S.C.A. § 791a et seq., and, if not, (2) whether, notwithstanding 25 U.S.C. § 177, 25 U.S.C.A. § 177, those lands may be condemned by the licensee, under the eminent domain powers conferred by § 21 of the Federal Power Act, 16 U.S.C. § 814, 16 U.S.C.A. § 814. We now turn to a consideration of those questions in the order stated.

I.

A Commission finding that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" is required by § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), 16 U.S.C.A. § 797(e), only if the lands involved are within a "reservation" in the sense of that term as defined and used in that Act. That by generally accepted standards and common understanding these Tuscarora lands may be part of a "reservation" is not at all decisive of whether they are such within the meaning of the Federal Power Act. Congress was free and competent artificially to define the term "reservations" for the purposes it prescribed in that Act. And we are bound to give effect to its definition of that term, for it would be idle for Congress to define the sense in which it used it "if we were free in despite of it to choose a meaning for ourselves." *Fox v. Standard Oil Co.*, 294 U.S. 87, 96, 55 S.Ct. 333, 337, 79 L.Ed. 780. By § 3(2) of the Federal Power Act, 16 U.S.C. § 796(2), 16 U.S.C.A. § 796(2), Congress has provided:

"§ 3. The words defined in this section shall have the following meaning for purposes of this chapter, to wit:

"(2) 'reservations' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks." (Emphasis added.)

The plain words of this definition seem rather clearly to show that Congress intended the term "reservations," wherever used in the Act, to embrace only "lands and interests in lands owned by the United States."

[Legislative History]

Turning to the definition's legislative history, we find that it, too, strongly indicates that such was the congressional intention. In the original draft bill of the Federal Water Power Act of 1920, as proposed by the Administration and passed by the House in the Sixty-fifth and Sixty-sixth Congresses, the term was defined as follows:

"'Reservations' means lands and interest in lands owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public lands laws, and lands and interest in lands acquired and held for any public purpose."¹⁴

It is difficult to perceive how congressional intention could be more clearly and definitely expressed. However, after the bill reached the Senate it inserted the words "national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other" (emphasis added) at the beginning of the definition.¹⁵ When the bill was returned to the House it was explained that the Senate's "amendment recasts the House definition of 'reservations.'"¹⁶ The bill as enacted contained the definition as thus recast. It remains in that form, except for the deletion of the words "national monuments, national parks," which was occasioned by the Act of March 3, 1921 (41 Stat. 1353), 16 U.S.C.A. § 797 note, negating Commission authority to license any project works within "national monuments or national parks," and those words were finally deleted from the definition by amendment in 1935. 49 Stat. 838. It seems entirely clear that no change in substance was intended or effected by the Senate's amendment, and that its "recasting" only specified, as illustrative, some of the "reservations" on "lands and interests in lands owned by the United States."

14. See H.R.Rep. No. 715, 65th Cong., 2d Sess., p. 22; S.Rep. No. 180, 66th Cong., 1st Sess., p. 10.

15. See S. Rep. No. 180, 66th Cong., 1st Sess., p. 10; 59 Cong.Rec. 1103.

16. See H.R.Rep. No. 910, 66th Cong., 2d Sess., p. 7.

[Section 4(e) Examined]

Further evidence that Congress intended to limit "reservations," for the "purposes of this chapter" (§ 3), to those located on "lands owned by the United States" or in which it owns an interest is furnished by its use of the term in the context of § 4(e) of the Act. By that section Congress, after authorizing the Commission to license projects in streams or other bodies of water over which it has jurisdiction under the *Commerce Clause* of the Constitution (Art. I, § 8, cl. 3), authorized the Commission to license projects "upon any part of the public lands and reservations of the United States." Congress must be deemed to have known, as this Court held in *Federal Power Comm. v. State of Oregon*, 349 U.S. 435, 443, 75 S.Ct. 832, 837, 99 L.Ed. 1215, that the licensing power, "in relation to public lands and reservations of the United States springs from the Property Clause" of the Constitution—namely, the " . . . Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." Art. IV, § 3, cl. 2. In thus acting under the Property Clause of the Constitution, Congress must have intended to deal only with "the Territory or other Property belonging to the United States." *Ibid.*

[Compensation Plan Looked To]

Moreover, the Federal Power Act's plan of compensating for lands taken or used for licensed projects is explicable only if the term "reservations" is confined, as Congress evidently intended, to those located on "lands owned by the United States" or in which it owns a proprietary interest. By § 21, 16 U.S.C. § 814, 16 U.S.C.A. § 814, licensees are authorized to *acquire* "the lands or property of others necessary to the" licensed project "by the exercise of the right of eminent domain" in the federal or state courts, and, of course, upon the payment of just compensation. But, despite its general and all inclusive terms, § 21 does not apply to nor authorize condemnation of lands or interests in lands owned by the United States, because § 10(e) of the Act, 16 U.S.C. 803(e), 16 U.S.C.A. § 803(e), expressly provides that "the licensee shall pay to the United States reasonable annual charges . . . for recompensating it for the use, occupancy, and enjoyment of its lands or other property" (emphasis added) devoted to the

licensed project. It therefore appears to be unmistakably clear that by the language of the first proviso of that section saying, in pertinent part, "That when licenses are issued involving the use of Government dams or other structures owned by the United States or *tribal lands embraced within Indian reservations* (these italicized words being lifted straight from the § 3(2) definition of 'reservations') the Commission shall . . . fix a reasonable annual charge for the use thereof . . .," Congress intended to treat and treated only with structures, lands and interests in lands owned by the United States, for, as stated, the section expressly requires the "reasonable annual charges" to be paid to the *United States* for the use, occupancy, and enjoyment of "its lands or other property." (Emphasis added.)

This analysis of the plain words and legislative history of the Act's definition of "reservations" and of the plan and provisions of the Act leaves us with no doubt that Congress, "for purposes of this chapter" (§ 3(2)), intended to and did confine "reservations," including "tribal lands . . . within Indian reservations" (§ 3(2)), to those located on lands "owned by the United States" (§ 3(2)), or in which it owns a proprietary interest.

[Court of Appeals' Conclusion]

The Court of Appeals did not find to the contrary. Indeed, it found that the Act's definition of "reservations" includes only those located on lands in which the United States "has an interest." But it thought that the national paternal relationship to the Indians and the Government's concern to protect them against improper alienation of their lands gave the United States the requisite "interest" in the lands here involved, and that the result "must be the same as if the phrase 'owned by the United States [etc.],' were not construed as a limitation upon the term 'tribal lands [etc.].'" 265 F.2d at page 342. We do not agree. The national "interest" in Indian welfare and protection "is not to be expressed in terms of property . . ." *Heckman v. United States*, 224 U.S. 413, 437, 32 S.Ct. 424, 56 L.Ed. 820. The national "paternal interest" in the welfare and protection of Indians is not the "interest in lands owned by the United States" required, as an element of "reservations," by § 3(2) of the Federal Power Act. (Emphasis added.)

Inasmuch as the lands involved are owned

in fee simple by the Tuscarora Indian Nation and no "interest" in them is "owned by the United States," we hold that they are not within a "reservation" as that term is defined and used in the Federal Power Act, and that a Commission finding under § 4(e) of that Act "that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" is not necessary to the issuance of a license embracing the Tuscarora lands needed for the project.

II.

We pass now to the question whether the portion of the Tuscarora lands here involved may be condemned by the licensee under the provisions and eminent domain powers of § 21 of the Federal Power Act. Petitioners contend that § 21 is a broad general statute authorizing condemnation of "the lands or property of others necessary to the construction, maintenance, or operation of any" licensed project, and that lands owned by Indians in fee simple, not being excluded, may be taken by the licensee under the federal eminent domain powers delegated to it by that section. Parrying this contention, the Tuscarora Indian Nation argues that § 21, being only a general Act of Congress, does not apply to Indians or their lands.

[Elk v. Wilkins *Relied On*]

The Tuscarora Indian Nation heavily relies upon *Elk v. Wilkins*, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643. It is true that in that case the Court, dealing with the question whether a native-born American Indian was made a citizen of the United States by the Fourteenth Amendment of the Constitution, said: "Under the constitution of the United States, as originally established . . . General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." 112 U.S. at pages 99-100, 5 S.Ct. at page 44. However that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests. In *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418, 55 S.Ct. 820, 79 L.Ed. 1517, the funds of a restricted Creek Indian were held and invested for him by the Superintendent, and a question arose as to whether

income from the investment was subject to federal income taxes. In an earlier case, *Blackbird v. Commissioner*, 38 F.2d 876, the Tenth Circuit had held such income to be exempt from federal income taxation. But in this case the Board of Tax Appeals sustained the tax, the Tenth Circuit affirmed, and the Superintendent brought the case here. This Court observed that in the *Blackbird* case the Tenth Circuit had said that "to hold a general act of Congress to be applicable to restricted Indians would be contrary to the almost unbroken policy of Congress in dealing with its Indian wards and their affairs. Whenever they and their interests have been the subject affected by the legislation they have been named and their interests specifically dealt with." That is precisely the argument now made here by the Tuscarora Indian Nation. But this Court, in affirming the judgment, said:

"This does not harmonize with what we said in *Choteau v. Burnet* (1931), 283 U.S. 691, 693, 696, 51 S.Ct. 598, 599, 600, 75 L.Ed. 1353:

"The language of [the Internal Revenue Act of 1918] subjects the income of 'every individual' to tax. Section 213(a) includes income 'from any source whatever.' The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income. The act does not expressly exempt the sort of income here involved, nor a person having petitioner's status respecting such income, and we are not referred to any other statute which does. . . . The intent to exclude must be definitely expressed, where, as here, the general language of the act laying the tax is broad enough to include the subject matter."

"The court below properly declined to follow its quoted pronouncement in *Blackbird's Case*. The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted. See *Irwin v. Gavit*, 268 U.S. 161, 45 S.Ct. 475, 69 L.Ed. 897; *Heiner v. Colonial Trust Co.*, 275 U.S. 232, 48 S.Ct. 65, 72 L.Ed. 256; *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 55 S.Ct. 50, 79 L.Ed. 211; *Pitman v. Commissioner*, 10 Cir., 64 F.2d 740. The purpose is sufficiently clear." 295 U.S. at pages 419-420, 55 S.Ct. at page 821.

[Oklahoma Tax Commission Case]

In *Oklahoma Tax Comm. v. United States*, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612, this Court, in holding that the estate of a restricted Oklahoma Indian was subject to state inheritance and estate taxes under general state statutes, said:

"The language of the statutes does not except either Indians or any other person from their scope." [319 U.S., at page 600, 63 S.Ct. at page 1285.] "If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." 319 U.S. at page 607, 63 S.Ct. at page 1288.

See, e. g., *Shaw v. Gibson-Zahniser Oil Corporation*, 276 U.S. 575, 581-582, 84 S.Ct. 333, 335-336, 72 L.Ed. 709; *United States v. Ransom*, 263 U.S. 691, 44 S.Ct. 230, 68 L.Ed. 508; *Kennedy v. Becker*, 241 U.S. 556, 563-564, 36 S.Ct. 705, 707-708, 60 L.Ed. 1166; *Choate v. Trapp*, 224 U.S. 665, 673, 32 S.Ct. 565, 568, 56 L.Ed. 941.

[A Comprehensive Plan]

The Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers. See § 4(e). It neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, the Act specifically defines and treats with lands occupied by Indians—"tribal lands embraced within Indian reservations." See §§ 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians. The Court of Appeals recognized that this is so. 265 F.2d at page 343. Section 21 of the Act, by broad general terms, authorizes the licensee to condemn "the lands or property of others necessary to the construction, maintenance, or operation of any" licensed project. That section does not exclude lands or property owned by Indians, and, upon the authority of the cases cited, we

must hold that it applies to these lands owned in fee simple by the Tuscarora Indian Nation.

The Tuscarora Indian Nation insists that even if its lands are embraced by the terms of § 21 of the Federal Power Act, they still may not be taken for public use "without the express consent of Congress referring specifically to those lands," because of the provisions of 25 U.S.C. § 177, 25 U.S.C.A. § 177.¹⁷ That section, in pertinent part, provides:

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * *

[Purpose of 25 U.S.C.A. § 177]

The obvious purpose of that statute is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government, acting as *parens patriae* for the Indians, to vacate any disposition of their lands made without its consent. See, e. g., *United States v. Hellard*, 322 U.S. 363, 64 S.Ct. 985, 88 L.Ed. 1326; *United States v. Candelaria*, 271 U.S. 432, 441-442, 46 S.Ct. 561, 562-563, 70 L.Ed. 1023; *Henkel v. United States*, 237 U.S. 43, 51, 35 S.Ct. 536, 539, 59 L.Ed. 831; *United States v. Sandavol*, 231 U.S. 28, 46-48, 34 S.Ct. 1, 5-6, 58 L.Ed. 107. But there is no such requirements with respect to conveyances to our condemnations by the United States or its licensees; "nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State * * *." *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206, 211, 63 S.Ct. 534, 537, 87 L.Ed. 716.

As to the Tuscaroras' contention that § 177 prohibits the taking of any of their lands for the reservoir "without the express and specific consent of Congress," one thing is certain. It is

17. The Tuscaroras also rely upon 25 U.S.C. § 233, 25 U.S.C.A. § 233, which confers, subject to qualifications, jurisdiction upon the courts of New York over civil actions between Indians and also between them and other persons, and contains a pertinent proviso "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York."

certain that if § 177 is applicable to alienations effected by condemnation proceedings under § 21 of the Federal Power Act, the mere "expressed consent" of Congress would be vain and idle. For § 177 at the very least contemplates the assent of the Indian nation or tribe. And inasmuch as the Tuscarora Indian Nation withholds such consent and refuses to convey to the licensee any of its lands, it follows that the mere consent of Congress, however express and specific, would avail nothing. Therefore, if § 177 is applicable to alienations effected by condemnation under § 21 of the Federal Power Act, the result would be that the Tuscarora lands, however imperative for the project, could not be taken at all.

[§ 177 Inapplicable to United States]

But, § 177 is not applicable to the sovereign United States nor, hence, to its licensees to whom Congress has delegated federal eminent domain powers under § 21 of the Federal Power Act. The law is now well settled that:

"A general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." *United States v. Wittek*, 337 U.S. 346, 358-359, 69 S.Ct. 1108, 1114, 93 L.Ed. 1406.

In *United States v. United Mine Workers of America*, 330 U.S. 258, 272-273, 67 S.Ct. 677, 686, 91 L.Ed. 884, the Court said:

"There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."

See, e. g., *Leiter Minerals, Inc., v. United States*, 352 U.S. 220, 224-225, 77 S.Ct. 287, 290, 1 L.Ed.2d 267; *United States v. Wyoming*, 331 U.S. 440, 449, 67 S.Ct. 1319, 1324, 91 L.Ed. 1590; *United States v. Stevenson*, 215 U.S. 190, 30 S.Ct. 35, 54 L.Ed. 153; *United States v. American Bell Telephone Co.*, 159 U.S. 548, 553-555, 16 S.Ct. 69, 71-72, 40 L.Ed. 255; *Lewis v. United States*, 92 U.S. 618, 622, 23 L.Ed. 513; *United States v. Herron*, 20 Wall. 251, 263, 22 L.Ed. 275; *Dollar Savings Bank v. United States*, 19 Wall. 227, 239, 22 L.Ed. 80.

[Precedents Cited]

This Court has several times applied, in combination, the rules (1) that general Acts of Con-

gress apply to Indians as well as to all others in the absence of a clear expression to the contrary, and (2) that general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect. It did so in *Henkel v. United States*, 237 U.S. 43, 35 S.Ct. 536 (sustaining the right of the United States to take Indian lands for reservoir purposes under the general Reclamation Act of June 17, 1902, 32 Stat. 388), in *Spalding v. Chandler*, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469 (sustaining the power of the Government to convey a strip of land through a track owned by an Indian tribe to one Chandler for the use of the State of Michigan in constructing a canal, even though the conveyance was in derogation of a treaty with the Indian tribe), and in *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 10 S.Ct. 965, 34 L.Ed. 295. There, this Court sustained the right of a licensee of the Government to take so much of the undescribed fee lands of an Indian tribe as were necessary for the licensed project, though in derogation of the terms of a treaty between the United States and the Indian tribe,¹⁸ saying:

18. The Tuscarora Indian Nation argues that its lands in question should be regarded as subject to and protected from condemnation by the Treaty of Fort Stanwix of 1784 (7 Stat. 15), the unratified Treaty of Fort Harmar of 1789 (7 Stat. 33), and the Treaty of Canandaigua of 1794 (7 Stat. 44). But the record shows that the first two of these treaties related to other lands and, principally at least, to other Indian nations, and that the last treaty mentioned, though covering the lands in question, was with another Indian nation (the Senecas) which, pursuant to the Treaty of Big Tree in 1797 (7 Stat. 601) and with the approbation of the United States, sold its interest in these lands to Robert Morris and thus freed them from the effects of the Treaty of Canandaigua of 1794. Robert Morris, in turn, conveyed these lands to the Holland Land Company and it, in turn, conveyed the part in question to the Tuscarora Indian Nation, and its title rests upon that conveyance, free of any treaty.

It appears from the record that, as earlier stated (see note 10), the Tuscaroras, save for a few of them who remained on their lands "on the Roanoke" in North Carolina, moved from their North Carolina lands to reside with the Oneidas in central New York—at a point about 200 miles east of the lands now owned by the Tuscaroras in Niagara County, New York—in 1775. The Tuscaroras had no proprietary interest in the Oneidas' lands in central New York but were there as "guests" of the Oneidas or as "tenants at will or by sufferance." Hough, *Census of the State of New York*, 1857, p. 510; *New York Senate Document No. 24*, 1846, p. 68. They came to be recognized, however, as members of the Five Nations which thereafter became known as the Six Nations (the others being the Oneidas, the Mohawks, the Onondagas, the Cayugas and the Senecas). The Senecas occupied

"It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several states, and could not exercise the same power in a territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its

a vast area in western New York, including the lands here in question. A few Tuscaroras fought with the Senecas on the side of the British and after their defeat at the battle of Elmira in 1779, they went to reside with the Senecas in the vicinity of Fort Niagara in about 1780. Other Tuscaroras then moved to that place. Just when they did so is not known with certainty and it appears that the most that can be said is that they were there prior to 1797. The Tuscaroras had the same kind of tenure, i. e., guests or tenants at will or by sufferance, with the Senecas as they had earlier had with the Oneidas in central New York. One of their chiefs described their situation as "squatters upon the territory of another distinct nation."

By the Treaty of Fort Stanwix of 1784 (7 Stat. 15) and the unratified Treaty of Fort Harmar of 1789 (7 Stat. 33) with the Six Nations, the United States promised to hold the Oneidas and the Tuscaroras secure in the lands upon which they then lived—which were the lands in central New York about 200 miles east of the lands in question. By the same treaties the United States promised to secure to the Six Nations a tract of land in western New York in the vicinity of the Niagara River. By the Treaty of Canandaigua of 1794 (7 Stat. 44) between the United States and the Six Nations, which superseded the prior treaties (except, by Article 6, the United States remained bound to pay the Tuscaroras \$4,500 per year for the purchase of clothing), it was recognized that the Senecas alone had possessory rights to the western New York area here involved and, as a result of that treaty, a large tract of western New York lands, including the lands now owned by the Tuscaroras, was secured to the Senecas.

Under the 1786 Hartford Compact between New York and Massachusetts, New York was recognized to have sovereignty over those lands and Massachusetts to own the underlying fee to those lands and the right to purchase the Senecas' interest in them. In 1794, Massachusetts sold the fee and the right to purchase the Senecas' right to occupy these western New York lands, including the lands now owned by the Tuscaroras, to Robert Morris, who, in turn, sold those lands and rights to the Holland Land Company with the covenant that he would buy out the Senecas' rights of occupancy for and on behalf of the Holland Land Company. And at the Treaty of Big Tree of 1797 (7 Stat. 601), Morris, with the approbation of the United States, purchased the Senecas' rights of occupancy in the lands here in question for the Holland Land Company. Thus the lands in question were entirely freed from the effects of all then existing treaties with the Indians, and the Tuscaroras' title to its present lands derives, as earlier stated, from the Holland Land Company (see note 10 for further details) and has never since been subject to any treaty between the United States and the Tuscaroras.

political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it, provided only that they are not taken without just compensation being made to the owner." 135 U.S. at pages 656-657, 10 S.Ct. at page 971.

See also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299; *Missouri-Kansas & Texas R. Co. v. Roberts*, 152 U.S. 114, 117-118, 14 S. Ct. 496, 497, 38 L.Ed. 377; *Beecher v. Wetherby*, 95 U.S. 517, 24 L.Ed. 440; *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449.

In the light of these authorities we must hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation; that the lands in question are not subject to any treaty between the United States and the Tuscaroras (see notes 10 and 18); and that 25 U.S.C. § 177, 25 U.S.C.A. § 177 does not apply to the United States itself nor prohibits it, or its licensees under the Federal Power Act, from taking such lands in the manner provided by § 21, upon the payment of just compensation.

[United States' Faith Unimpaired]

All members of this Court—no one more than any other—adhere to the concept that agreements are made to be performed—no less by the Government than by any other; but the federal eminent domain powers conferred by Congress upon the Commission's licensee, by § 21 of the Federal Power Act, to take such of the lands of the Tuscaroras as are needed for the Niagara project does not breach the faith of the United States, nor any treaty or other contractual agreement of the United States with the Tuscarora Indian Nation in respect to these lands for the conclusive reason that there is none.

Reversed.

Mr. Justice BRENNAN concurs in the result.

Dissent by Black, Warren, Douglas

Mr. Justice BLACK, whom the CHIEF JUSTICE and Mr. Justice DOUGLAS join, dissenting.

The Court holds that the Federal Power Act¹ authorizes the taking of 22% (1,383 acres) of the single tract which the Tuscarora Indian Nation has owned and occupied as its homeland for 150 years.² Admittedly this taking of so large a part of the lands will interfere with the purpose for which this Indian reservation was created—a permanent home for the Tuscaroras. I not only believe that the Federal Power Act does not authorize this taking, but that the Act positively prohibits it. Moreover, I think the taking also violates the Nation's long-established policy of recognizing and preserving Indian reservations for tribal use, and that it constitutes a breach of Indian treaties recognized by Congress since at least 1794.

[Meaning of Reservation]

Whether the Federal Power Act permits this condemnation depends, in part, upon whether the Tuscarora Reservation is a "reservation" within the meaning of the Act. For if it is, § 4(e) forbids the taking of any part of the lands except after a finding by the Federal Power Commission that the taking "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired * * *."³ There is no such finding here. In fact,

the Commission found that the inundation of so great a part of the Tuscarora Reservation by the waters of the proposed reservoir "will interfere and will be inconsistent with the purpose for which such reservation was created or acquired." 21 F.P.C. 146, 148. If these Tuscarora homelands are "tribal lands embraced within [an] Indian reservations" as used in § 3(2)⁴ they constitute a "reservation" for purposes of § 4(e), and therefore the taking here is unauthorized because the requisite finding could not be made.

[These Lands Included]

I believe the plain meaning of the words used in the Act, taken alone, and their meaning in the light of the historical background against which they must be viewed, require the conclusion that these lands are a "reservation" entitled to the protections of § 4(e) of the Act. "Reservation," as used in § 4(e), is defined by § 3(2), which provides:

"'reservations' means national forests, *tribal lands embraced within Indian reservations*, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; * * *." (Emphasis supplied.)

The phrase, "tribal lands embraced within Indian reservations" surely includes these Tusca-

for federal power projects. The part that is of crucial significance here reads:

"[L]icenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations * * *."

Title 16 U.S.C. § 797(e), 16 U.S.C.A. § 797(e), enacted as § 4(d) in the Federal Water Power Act of 1920, 41 Stat. 1063, was re-enacted in the 1935 amendments, 49 Stat. 838, as § 4(e) and is referred to as such throughout.

4. Section 3, 16 U.S.C. § 796, 16 U.S.C.A. § 796, is the general definitions section of the Federal Power Act, and was first enacted in the Federal Water Power Act of 1920, 41 Stat. 1063. Section 3(2) defines the term "reservations."

1. 41 Stat. 1063, as amended, 16 U.S.C. §§ 791a-828c, 16 U.S.C.A. §§ 791a-828c.

2. While the petitioners have argued that Congress authorized this taking in the 1957 Niagara Power Act, 71 Stat. 401, 16 U.S.C. §§ 836, 836a, 16 U.S.C.A. §§ 836, 836a, the Court does not accept this argument. Neither do I. There is absolutely no evidence that Congress was in any way aware that these Tuscarora lands would be required by the Niagara Power Project. The petitioners have also argued that Congress impliedly authorized this taking in the 1957 Act because in fact the Tuscarora lands are indispensable to the Niagara Power Project. But the record shows that the reservation lands are not indispensable. The Federal Power Commission first found that "other lands are available." 19 F.P.C. 186, 188. And see 265 F.2d 338, 343. On remand the Commission refused to find that the Indian lands were indispensable, although it did find that use of other lands would be much more expensive. 21 F.P.C. 146. And see 21 F.P.C. 273, 275. That other lands are more expensive is hardly proof that the Tuscarora lands are indispensable to this \$700,000,000 project.

3. Section 4(e) contains the general grant of power for the Federal Power Commission to issue licenses

rorra lands. They are tribal lands. They are embraced within the Tuscarora Indian Nation's reservation. The lands have been called a reservation for more than 150 years. They have been so described in treaties, Acts of Congress, court decisions, Indian agency reports, books, articles, and maps. In fact, so far as I can ascertain they have never been called anything else, anywhere or at any time—until today. Even the Court of Appeals and the Federal Power Commission, and the briefs and record in this Court, quite naturally refer to this 10-square-mile tract of land as an Indian reservation. The Court itself seems to accept the fact that the Tuscarora Nation lives on a reservation according to (in its words) the "generally accepted standards and common understanding" of that term.

[Artificial Definition]

The Court, however, decides that in the Federal Power Act Congress departed from the meaning universally given the phrase "tribal lands embraced within Indian reservations" and defined the phrase, the Court says, "artificially." The Court believes that the words "other lands * * * owned by the United States," which follow, were intended by Congress to limit the phrase to include only those reservations to which the United States has technical legal title. By the Court's "artificial" interpretation, the phrase turns out to mean "tribal lands embraced within Indian reservations—except when the lands involved are owned in fee simply by the [Indians]."⁵

Creating such a wholly artificial and limited definition, so new and disruptive, imposes a heavy burden of justification upon the one who asserts it. We are told that many tribes own their reservation lands. The well-known Pueblos of New Mexico own some 700,000 acres of land in fee. All such reservation lands are put in jeopardy by the Court's strained interpretation. The Court suggests no plausible reason, or any reason at all for that matter, why Congress should or would have sought artificially to place those Indians who hold legal title to their reservation lands in such a less-favored position.⁶ The

fact that the Tuscarora Nation holds technical legal title is fortuitous and an accidental circumstance probably attributable to the Indian land policy prevailing at the early date this reservation was established. Their lands, like all other Indian tribal lands, can be sold, leased or subjected to easements only with the consent of the United States Government. Congress and government agencies have always treated the Tuscarora Reservation the same as all others,⁷ and there is no reason even to suspect that Congress wanted to treat it differently when it passed the Federal Power Act.

[Legislative History]

It is necessary to add no more than a word about the legislative history of this section which the Court relies on. The Court points out that the House version of the 1920 Federal Water Power Act (now called the Federal Power Act) defined "reservations" as meaning only "lands and interests in lands owned by the United States." In this definition of "reservations" the Senate inserted new words which included the present phrase "tribal lands embraced within Indian reservations." If the only Indian lands Congress sought to cover by this section were those to which the United States had title, the Senate addition served no purpose. For the House bill covered all "lands * * * owned by the United States." The only reason for the Senate additions, it seems to me, was to cover lands, like those of the Tuscarora Nation here, title to which was *not* in the United States Government.

The Court also undertakes to support its "artificial" definition of "tribal lands embraced

whatsoever on the United States' rights and responsibilities towards these Indians and their lands. See *The New York Indians*, 5 Wall. 761, 767, 18 L.Ed. 708, for a similar holding as to Seneca Indian lands in New York governed by the same treaty under which the Tuscaroras assert their rights in this case. And see also *United States v. Hellard*, 322 U.S. 363, 366, 64 S.Ct. 985, 987, 88 L.Ed. 1326 ("the governmental interest * * * is as clear as it would be if the fee were in the United States"); *State of Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820.

5. The Court's opinion states: "Inasmuch as the lands involved are owned in fee simple by the Tuscarora Indian Nation * * * we hold that they are not within a 'reservation' * * *"

6. In *United States v. Candelaria*, 271 U.S. 432, 440, 46 S.Ct. 561, 562, 70 L.Ed. 1023, and *United States v. Sandoval*, 231 U.S. 28, 39, 34 S.Ct. 1, 3, 58 L.Ed. 107, this Court has held that the Pueblos' fee simple ownership of their lands has no effect

7. See, e. g., Report of the Commissioner of Indian Affairs, H.R.Exec.Doc. No. 1, Vol. I, Pt. 5, 45th Cong., 2d Sess. 398, 558-564 (1877). See also 64 Stat. 845, 25 U.S.C. § 233, 25 U.S.C.A. § 233, which specifically subjects all New York tribes to Rev.Stat. § 2116 (1875), 25 U.S.C. § 177, 25 U.S.C.A. § 177, which bans alienation of their lands without the consent of Congress. And see general notes 6, supra, 9, 11, 16, 17, 20, infra.

within Indian reservations" by saying that the Congress knew, by a prior decision of this Court, that it was acting under Art. IV, § 3, cl. 2, of the Constitution, which gives Congress power, as the Court says, "to deal only with 'the Territory or other Property belonging to the United States.'" In the first place I do not understand how the Court can say with such assurance that the Congress was acting only under that clause, as there is no evidence whatsoever that Congress expressed itself on this matter. Moreover, it seems far more likely to me that in this phrase regulating Indian tribes Congress was acting under Art. I, § 8, cl. 3, which empowers Congress "to regulate Commerce with . . . the Indian tribes."

[*United States Owns Interest*]

Even accepting for a moment the Court's "artificial" definition, I think the United States owns a sufficient "interest" in these Tuscarora homelands to make them a "reservation" within the meaning of the Act. Section 3(2) does not merely require a finding in order to take "tribal lands embraced within Indian reservations;" the same finding is required in order to take "other . . . interests in lands owned by the United States" whether tribal or not. Or, again accepting the Court's conception, if the phrase "tribal lands embraced within Indian reservations" must be modified by the words which follow "lands owned by the United States," it must also be modified by the words "interests in lands owned by the United States," which also follow. Read this way, the section defines "reservations" as tribal lands in which the United States owns "interests." Thus again a finding under § 4(e) is required even under the Court's own technical approach if the United States owns "interests" in the lands. I think it does.

Certainly the words Congress used, "interests in lands," are not surplusage; they have some meaning and were intended to accomplish some purpose of their own. The United States undoubtedly controls (has "interests in") many lands in this country that it does not own in fee simple. This is surely true as to all Indian tribal lands, even though the Indians own the fee simple title.⁸ Such lands cannot be sold or leased without the consent of the United States Govern-

ment. The Secretary of the Interior took this position about this very reservation in 1912 when the Tuscaroras desired to lease a part of their lands to private individuals for limestone quarrying.⁹ And, of course, the long-accepted concept of a guardian-ward relationship between the United States and its Indians, with all the requirements of fair dealing and protection that this involves, means that the Indians are not free to treat their lands as wholly their own.¹⁰ Anyone doubting the extent of ownership interest in these lands by the United States would have that doubt rapidly removed should he take a deed from the Tuscarora Nation without the consent of the Government.¹¹ I cannot agree, therefore, that this all but technical fee ownership which the United States has in these lands is inadequate to constitute the kind of "interests in lands owned by the United States" which requires a § 4(e) finding before condemnation.

[*An Incorrect Interpretation?*]

After the Court concludes that because of its interpretation of the definition of "reservations" in § 3(2) a finding is not required by § 4(e) to take the Tuscarora lands, it goes on to find the necessary congressional authorization to take these lands in the general condemnation provisions of § 21. 16 U.S.C. § 814, 16 U.S.C.A. § 814. I believe that this is an incorrect interpretation of the general power to condemn under § 21, both because Congress specifically provided for the taking of all Indian reservation lands it wanted taken in other sections of the

9. See 51 Cong.Rec. 11659-11660, 14561-14562. And see note 16, *infra*.

10. See, e.g., *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 657, 10 S.Ct. 965, 971, 34 L.Ed. 295; *Elk v. Wilkins*, 112 U.S. 94, 99, 5 S.Ct. 41, 44, 28 L.Ed. 643; *Ex parte Crow Dog*, 109 U.S. 556, 569, 3 S.Ct. 396, 27 L.Ed. 1030; *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25. See also *United States v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 563, where this Court pointed out that the same concept had applied under Spanish and Mexican law. And see also *United States v. Kagama*, 118 U.S. 375, 384, 6 S.Ct. 1109, 1114, 30 L.Ed. 228 ("duty of protection"), and Chief Justice Marshall's leading opinion in *Johnson v. McIntosh*, 8 Wheat. 543, 591, 5 L.Ed. 681 ("Indians [are] to be protected . . . in the possession of their lands").

11. In *United States v. Candelaria*, 271 U.S. 432, 46 S.Ct. 561, for example, this Court held that the United States could set aside a deed from the Pueblos of lands to which the Indians had fee simple title, even though the issue in the case had been settled by otherwise applicable principles of *res judicata* in prior litigation to which the Indians, but not the United States, had been a party. See note 9, *supra*.

8. The Court of Appeals held the United States had an adequate § 3(2) "interest in" the Tuscarora Reservation to require a § 4(e) finding. 265 F.2d 338, 342. See notes 6, *supra*, and 16, *infra*.

same Act, and because a taking under § 21 is contrary to the manner in which Congress has traditionally gone about the taking of Indian lands—such as Congress here carefully prescribed in § 4(e). Congress has been consistent in generally exercising this power to take Indian lands only in accord with prior treaties, only when the Indians themselves consent to be moved, and only by Acts which either specifically refer to Indians or by their terms must include Indian lands. None of these conditions is satisfied here if § 21 is to be relied upon. The specific and detailed provisions of § 10(e), 16 U.S.C. § 803(e), 16 U.S.C.A. § 803(e), upon which the Court relies, only emphasize to me the kind of care Congress always takes to protect the just claims of Indians to reservations like this one.

[Cited Cases Inapposite?]

The cases which the Court cites in its opinion do not justify the broad meaning read into § 21. Many of those cases deal with taxation—federal and state. The fact that Indians are sometimes taxed like other citizens does not even remotely indicate that Congress has weakened in any way its policy to preserve “tribal lands embraced within Indian reservations.” Moreover, cases dealing with individuals who are not Indians are not applicable to tribal reservations. For example, *Shaw v. Gibson-Zahner Oil Corp.*, 276 U.S. 575, 48 S.Ct. 333, 72 L.Ed. 709, cited by the Court, did not involve tribal lands. That case only held that a State may tax the production of an oil company even though it was derived from oil company lands leased from an Indian. The owner there was an individual Indian, not a tribe, and the lands were not and never had been a part of an Indian reservation, but rather had been purchased for this single Indian with the royalties he obtained from his own original restricted allotted lands. In *Henkel v. United States*, 237 U.S. 43, 35 S.Ct. 536, which involved the taking of Indian lands for the vast western reclamation project, the Court not only found that it had been “well known to Congress” that Indian lands would have to be taken, 237 U.S. at page 50, 35 S.Ct. at page 539, but the treaty with the Indians involved in that case contained a specific consent by the Indians to such a taking. 29 Stat. 356, quoted 237 U.S. at 48, 35 S.Ct. at 538. There was no provision even resembling this in the Treaty of 1794 with the Tuscaroras. Other cases, relied on by the Court, such as

Spalding v. Chandler, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469, and *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 10 S.Ct. 965, all involved statutes that made it clear that Congress was well aware it was authorizing the taking of Indians’ lands—unlike the history of § 21 of the Federal Power Act and the 1957 Niagara Power Act, 71 Stat. 401, 16 U.S.C. §§ 836, 836a, 16 U.S.C.A. §§ 836, 836a, involved here.

[Fundamental and Decisive Reasons]

All that I have said so far relates to what the Court calls the “plain words” of the statute. I interpret these “plain words” differently than the Court. But there are other more fundamental and decisive reasons why I disagree with the Court’s interpretation of the Federal Power Act as it relates to Indians. The provisions in § 4(e) which protect Indian reservations against destruction by condemnation cannot be properly construed unless considered as a part of a body of Indian laws built up throughout this Nation’s history, and extending back even to the Articles of Confederation. It is necessary to summarize briefly a part of that history.

The experience of the Tuscarora Nation illustrates this history as well as that of any Indian tribe.¹² When this country was discovered the Tuscarora Nation lived and owned its homelands in the area that later became North Carolina. Early settlers wanted their lands. The Tuscaroras did not want to give them up. Numerous conflicts arose because of this clash of desires. Finally, about 1710, there was a war between the Tuscaroras and the colonists in North and South Carolina. The Indians were routed. A majority of their warriors were killed. Hundreds of their men, women and children were captured and sold into slavery. Nearly all of the remainder of the tribe fled. They found a home

12. For general discussions of the Tuscaroras’ history see Hodge (editor), *Handbook of American Indians* (1910), Pt. 2, 842-853, Smithsonian Institution Bureau of American Ethnology, Bulletin 30, H.R. Doc. No. 926, 59th Cong., 1st Sess.; Cohen, *Handbook of Federal Indian Law* (1941), 423; Morgan, *League of the Iroquois* (1904), I, 23, 42, 93, II, 77, 187, 305; Cusick, *Ancient History of the Six Nations* (1848), 31-35; H.R. Doc. No. 1590, 63d Cong., 3d Sess. 7, 11-15 (1915); H.R. Exec. Doc. No. 1, Vol. I, Pt. 5, 45th Cong., 2d Sess. 562-563 (1877). And see statements in *New York Indians v. United States*, 30 Ct. Cl. 413 (1895); *Tuscarora Nation of Indians v. Power Authority of New York, D.C.W.D.N.Y.*, 1958, 164 F.Supp. 107; *People ex rel. Cusick v. Daly*, 1914, 212 N.Y. 183, 105 N.E. 1048, 1050.

in distant New York with the Iroquois Confederation of Nations. With their acceptance into the Confederation about 1720 it became known as the Six Nations. Historical accounts indicate that about 1780 those Tuscaroras who had supported America in the Revolution were compelled to leave their first residence in New York because of the hostility of Indians who had fought with the British against the Colonies.¹³ They migrated to the Village of Lewiston, New York, near Niagara Falls and settled in that area as their new home. They have remained there ever since—nearly 180 years. When their legal right to this land came into question about 1800 the Seneca Indians and the Holland Land Company both "thought their claim so just"¹⁴ that they gave the Tuscarora Nation deeds to three square miles of the area they had been occupying for about 20 years. With the assistance of Presidents Washington and Jefferson and the Congress, the Tuscaroras were able, through the Secretary of War, to sell their vast North Carolina lands for \$15,000. With this money, held by the Secretary of War as trustee, additional lands adjoining those received from the Seneca Indians and the Holland Land Company were obtained for the Tuscarora Nation and the title held in trust by the Secretary of War from 1804 to 1809. The Secretary supervised the payments to the Holland Land Company, from which the additional 4,329 acres were obtained, and when payments were completed he conveyed these lands to the Tuscarora Nation.¹⁵ The 1,383 acres of the Tuscarora Reservation involved today is a part of this purchase. Despite all this and the Govern-

ment's continuing guardianship over these Indians and their lands throughout the years the Court attempts to justify this taking on the single ground that the Indians, not the United States Government, now own the fee simple title to this property.

[Removal Treaty of 1838]

In 1838 the Government made a treaty with the Tuscaroras under which they were to be removed to other parts of the United States.¹⁶ The removal was to be carried out under the authority of a Congressional Act of 1830, 4 Stat. 411, which provided a program for removing the Indians from the Eastern United States to the West. Section 3 of that Act provided authority "for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs and successors, the country so exchanged with them * * *." The same Act also provided "that nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes." *Id.*, § 7.

The Tuscarora Nation then had such a treaty with the United States, which had been in existence since 1794 and is still recognized by Congress today.¹⁷ The treaty was made with all the

13. See Handbook of American Indians, *op. cit.*, supra, note 12, at 848.

14. Letter from Theophilus Cazenove to Joseph Ellicott, May 10, 1798, 1 Bingham (editor), Holland Land Company's Papers: Reports of Joseph Ellicott (Buffalo Hist. Soc. Pub. Vol. 32, 1937) 21, 23.

15. In addition to the general histories cited, note 12, supra, this particular transaction is described in various letters and speeches of the Tuscaroras and the Secretary of War. See Letters Sent by the Secretary of War Relating to Indian Affairs (National Archives, Record Group 75, Interior Branch), Vol. A, 18-19, 22-23, 113-114, 117-119, 147-148, 402, 425-426, 438-439, Vol. B, 29, 274, 421; 6 Buffalo Hist. Soc. Pub. 221; and letter from Erastus Granger to Secretary of War Henry Dearborn, July 20, 1804, in Buffalo Hist. Soc. manuscript files. The deeds are recorded in the Niagara County Clerk's Office, Lockport, New York, Nov. 21, 1804, Liber B, pp. 2-7; Jan. 2, 1809, Liber A, p. 5 "[I]n 1804 Congress authorized the Secretary of War to purchase additional land for these Indians." From a Department of Interior letter, H.R.Doc. No. 1590, 63d Cong., 3d Sess. 7. And see the Court's note 10, and *Fellows v. Blacksmith*, 19 How. 366, 15 L.Ed. 684.

16. Treaty of January 15, 1838, 7 Stat. 550, 554 (Article 14, "Special Provisions For the Tuscaroras").

The interest of the government in Indian lands was a part of the law of Spain, Mexico, Great Britain and other European powers during pre-Colonial days. *United States v. Candelaria*, 271 U.S. 432, 442, 46 S.Ct. 561, 563; *United States v. Kagama*, 118 U.S. 375, 381, 6 S.Ct. 1109, 30 L.Ed. 228; *Worcester v. Georgia*, 6 Pet. 515, 551-552, 8 L.Ed. 483; *Cherokee Nation v. State of Georgia*, 5 Pet. 1, 17-18, 8 L.Ed. 25. The original Articles of Confederation provided for congressional control of Indian affairs in Article 9. A similar provision is in the Commerce Clause of the present Constitution. One of the first Acts of the new Congress was the so-called Non-Intercourse Act of July 22, 1790, 1 Stat. 137, which provided, in § 4, "That no sale of lands made by any Indians * * * shall be valid * * * unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." The similar provision is presently found in 25 U.S.C. § 177, 25 U.S.C.A. § 177, as modified by 16 Stat. 566, 25 U.S.C. § 71, 25 U.S.C.A. § 71.

17. Treaty of November 11, 1794, 7 Stat. 44. Article 6 of that Treaty provides: "[B]ecause the United States desire, with humanity and kindness, to contribute to their comfortable support * * * the United States will add the sum of three thousand dollars to the one thousand five hundred dollars,

Six Nations, at a time when the Tuscarora Nation had been a member for over 70 years, and one of their representatives signed the treaty.¹⁸ In Article 3 of the Treaty the United States Government made this solemn promise:

"Now, the United States acknowledge all land within the aforementioned boundaries, to be the property of the Seneca nation; and the United States will never claim the same, or disturb the Seneca nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

This article of the 1794 Treaty substantially repeated the promise given the Tuscaroras in the prior 1784 Treaty, 7 Stat. 15, made before our Constitution was adopted, that "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled."

heretofore allowed them by an article ratified by the President [April 23, 1792]; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, [etc.] * * *"

Every Congress until the 81st indicated that their \$4,500 annual appropriation rested upon "article 6, treaty of November 11, 1794." E. g., 62 Stat. 1120, 80th Cong., 2d Sess. Subsequent Congresses simply appropriated a total amount for Indian treaty obligations including "treaties with Senecas and Six Nations of New York * * *." E. g., 63 Stat. 774, 81st Cong., 1st Sess. In 1951 the 82d Cong., 1st Sess., appropriated simply "such amounts as may be necessary after June 30, 1951" for this purpose. 65 Stat. 254. At the hearings it was explained that this provision "would have the effect of being permanent law insofar as making the funds available without having to be included in each annual appropriation act. * * * [I]t is a treaty obligation and has always been paid by the Government in full. * * * These treaties have been in existence for many, many years." Director D. Otis Beasley, Division of Budget and Finance, Department of the Interior, Hearings before the Subcommittee on Interior Department of the House Committee on Appropriations on Interior Department Appropriations for 1952, 82d Cong., 1st Sess., Pt. 2, 1747, 1764.

18. "Kanatsoyh, alias Nicholas Kusik," signed the 1794 Treaty as a Tuscarora, but is not so identified there. However, he also signed the Treaties of December 2, 1794, 7 Stat. 47, and January 15, 1838, 7 Stat. 550, for the Tuscarora Nation and is listed there as a "Tuscarora." It has never been hinted, until the Court's note 18 today, that the Tuscarora Nation is for some reason not included in this November 11, 1794, Six Nations' Treaty.

[Enlarged Interpretation Argued]

Of course it is true that in 1794, when the Treaty was signed, the Tuscarora Nation did not yet have the technical legal title to that part of the reservation which the Government was later able to obtain for it. But the solemn pledge of the United States to its wards is not to be construed like a money-lender's mortgage. Up to this time it has always been the established rule that this Court would give treaties with the Indians an enlarged interpretation; one that would assure them beyond all doubt that this Government does not engage in sharp practices with its wards.¹⁹ This very principle of interpretation was applied in the case of *The New York Indians*, 5 Wall. 761, 768, 18 L.Ed. 708, where the Court said, about *this* treaty:

"It has already been shown that the United States have acknowledged the reservations to be the property of the Seneca nation—that they will never claim them nor disturb this nation in their free use and enjoyment, and that they shall remain theirs until they choose to sell them. These are the guarantees given by the United States, and which her faith is pledged to uphold."

[Post-1838 Events]

After the Treaty of 1838 was signed, in which the Tuscaroras agreed to go west, they decided not to do so, and the Government respected their objections and left them with their lands. They have, since that time, held it as other Indians have throughout the Nation. This has been in accord with the settled general policy to preserve such reservations against any kind of taking, whether by private citizens or govern-

19. *The Kansas Indians*, 5 Wall. 737, 760, 18 L.Ed. 667 ("enlarged rules of construction are adopted in reference to Indian treaties"); *Worcester v. State of Georgia*, 6 Pet. 515, 582, 8 L.Ed. 433 ("The language used in treaties with the Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction") (concurring opinion); *Tulee v. State of Washington*, 315 U.S. 681, 685, 62 S.Ct. 862, 864, 86 L.Ed. 1115 ("in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people"). And see *Spalding v. Chandler*, 160 U.S. 394, 405, 16 S.Ct. 360, 364, 40 L.Ed. 469; *Elk v. Wilkins*, 112 U.S. 94, 100, 5 S.Ct. 41, 44, 28 L.Ed. 643; *Ex parte Crow Dog*, 109 U.S. 556, 572, 3 S.Ct. 396, 406, 27 L.Ed. 1030; *United States v. Rogers*, 4 How. 567, 572, 11 L.Ed. 1105.

ment, that might result in depriving Indian tribes of their homelands against their will.²⁰ President Jackson, in 1835, explained the purpose of the removal and reservation program as meaning that, "The pledge of the United States has been given by Congress that the country destined for the residence of this people shall be forever 'secured and guaranteed to them.'"²¹ This policy was so well settled that when the Missouri compromise bill was being discussed in Congress in 1854 Texas Senator Sam Houston used this picturesque language to describe the Government's promise to the Indians:

"As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp

20. The origins of this policy extend into pre-Colonial British history. As Chief Justice Marshall said in *Worcester v. State of Georgia*, 6 Pet. 515, 547, 8 L.Ed. 483, in speaking of the Indian land policy, "The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them."

Chief Justice Marshall quoted at the same place similar language from a speech made to the American Indians by the British Superintendent of Indian affairs in 1763. This principle has been consistently recognized by this Government and this Court. *Spalding v. Chandler*, 160 U.S. 394, 403, 16 S.Ct. 360, 364, 40 L.Ed. 469; *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 197, 23 L.Ed. 846; *The New York Indians*, 5 Wall. 761, 768, 18 L.Ed. 708; *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25; *Johnson v. McIntosh*, 8 Wheat. 543, 5 L.Ed. 681. And see 48 Stat. 987, 25 U.S.C. § 476, 25 U.S.C.A. § 476; 25 U.S.C. §§ 311-328, 25 U.S.C.A. §§ 311-328 and 25 CFR § 161.3(a).

The age and scope of this doctrine of guardianship and fairness to the Indians is well illustrated in a statement made by President Washington, December 29, 1790, responding to an address by the chiefs and councilors of the Seneca Nation:

"I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding."

"Here then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights." 4 American State Papers (Indian Affairs, Vol. I, 1832) 142; 31 Washington, Writings (United States George Washington Bicentennial Comm'n ed. 1939) 179, 180.

21. Seventh Annual Message, Dec. 7, 1835, 3 Richardson, Messages and Papers of the Presidents 1789-1897, 147, 172.

fires, so long shall you be protected by this Government, and never again removed from your present habitations."²²

It was to carry out these sacred promises made to protect the security of Indian reservations that Congress adopted § 4(e) which forbids the taking of an Indian reservation for a power project if it will "interfere . . . with the purpose for which such reservation was created or acquired . . ." But no such finding was made or could be made here.

[Power Project's Importance]

There can be no doubt as to the importance of this power project. It will be one of the largest in this country and probably will have cost over \$700,000,000 when it is completed. It is true that it will undoubtedly cost more to build a proper reservoir without the Tuscarora lands, and that there has already been some delay by reason of this controversy. The use of lands other than those of the tribe will cause the abandonment of more homes and the removal of more people. If the decision in this case depended exclusively upon cost and inconvenience, the Authority undoubtedly would have been justified in using the Tuscarora lands. But the Federal Power Act requires far more than that to justify breaking up this Indian reservation.

These Indians have a way of life which this Government has seen fit to protect, if not actually to encourage. Cogent arguments can be made that it would be better for all concerned if Indians were to abandon their old customs and habits, and become incorporated in the communities where they reside. The fact remains, however, that they have *not* done this and that they have continued their tribal life with trust in a promise of security from this Government.

Of course, Congress has power to change this traditional policy when it sees fit. But when such changes have been made Congress has ordinarily been scrupulously careful to see that new conditions leave the Indians satisfied. Until Congress has a chance to express itself far more clearly that it has here the Tuscaroras are entitled to keep their reservation. It would be far better to let the Power Authority present the matter to Congress and request its consent to take these lands. It is not too late for it to do so

22. Cong. Globe, 33d Cong., 1st Sess., App. 202. See 1 Morison and Commager, *The Growth of the American Republic* (1950), 621.

now. If, as has been argued here, Congress has already impliedly authorized the taking, there can be no reason why it would not pass a measure at once confirming its authorization. It has been known to pass a Joint Resolution in one day where this Court interpreted an Act in a way it did not like. See *Commissioner of Internal Revenue v. Estate of Church*, 335 U.S. 632, 639-640, 69 S.Ct. 322, 326, 93 L.Ed. 288. Such action would simply put this question of authorization back into the hands of the Legislative Department of the Government where the Constitution wisely reposed it.²³

[*Valuable Things to Indians*]

It may be hard for us to understand why these Indians cling so tenaciously to their lands and

traditional tribal way of life.²⁴ The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.

There may be instances in which Congress has broken faith with the Indians, although examples of such action have not been pointed out to us. Whether it has done so before now or not, however, I am not convinced that it has done so here. I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like men, should keep their word.

23. See, e. g., *United States v. Hellard*, 322 U.S. 363, 367, 64 S.Ct. 985, 988, 88 L.Ed. 1326 ("the power of Congress over Indian affairs is plenary"); *United States v. Sandoval*, 231 U.S. 28, 45-46, 34 S.Ct. 1, 5, 58 L.Ed. 107; *Tiger v. Western Investment Co.*, 221 U.S. 286, 315, 31 S.Ct. 578, 586, 55 L.Ed. 738 ("it is for that body [Congress], and not the courts"); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565, 23 S.Ct. 216, 221, 47 L.Ed. 299 ("plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . not . . . the judicial department of the government"); *United States v. Rogers*, 4 How. 567, 572, 11 L.Ed. 1105.

24. "As we understand the position of the tribe, they do not complain so much of a possible lease or license for the use of the lands as they complain of a possible permanent loss of part of their homelands." Letter from Under Secretary of the Interior Bennett to Federal Power Commission Chairman Kuykendall, December 19, 1958, relating to the taking of these Tuscarora lands for the Niagara Power Project.

ORGANIZATIONS NAACP—Arkansas

Daisy BATES et al. v. CITY OF LITTLE ROCK et al.

United States Supreme Court, February 23, 1960, 80 S.Ct. 412.

SUMMARY: Arkansas NAACP officers were fined in state court for violating the "Bennett Ordinance" of Little Rock and North Little Rock by refusing to furnish, on behalf of the NAACP, "A financial statement of . . . dues, fees, assessments, and/or contributions paid, by whom paid. . . ." The refusal was based on the grounds that an anti-NAACP climate in the state caused fear of reprisals against members should their identity be revealed, and that anonymous participation in organizations is protected by the First and Fourteenth Amendments in the absence of a compelling reason or justifiable cause for disclosure. On appeal, the Supreme Court of Arkansas affirmed, two judges dissenting. It was reasoned that the cities could demand the information here called for in order to determine whether particular organizations are charitable or non-profit so as to qualify for statutory tax exemption, and that "when the required information is a mere incident to a legal result, then the information should be furnished." 319 S.W.2d 37, 4 Race Rel. L. Rep. 136 (Ark. 1958). The United States Supreme Court reversed. The court noted that the threat of the cities under their ordinances to force disclosure of names of members of the local NAACP branches had resulted in such fear of community hostility and economic reprisals that persons were dis-

couraged from joining and members were induced to withdraw. This state action was characterized as a significant repressive encroachment upon the First and Fourteenth Amendment protected personal freedoms of assembly and association that was neither speculative nor remote; and the state could justify such action only by showing "a subordinating interest which is compelling." Though the proper exercise of the power to tax may sometimes entail the possibility of encroaching upon individual freedoms, the court asserted that such action must bear a reasonable relationship to the achievement of the governmental purpose asserted as its justification. And it was held there was no such relevant correlation here between the cities' power to impose occupational taxes and compulsory disclosure and publication of NAACP membership lists, when the record failed to show that the organizations engaged in an occupation for which a license would be required even if it were conducted for profit, that a claim had been asserted by the cities against the organizations for payment of an occupation tax, or that a claim had been made by the organizations for exemption from any city taxes.

Mr. Justice STEWART delivered the opinion of the Court.

Each of the petitioners has been convicted of violating an identical ordinance of an Arkansas municipality by refusing a demand to furnish city officials with a list of the names of the members of a local branch of the National Association for the Advancement of Colored People. The question for decision is whether these convictions can stand under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Municipalities in Arkansas are authorized by the State to levy a license tax on any person, firm, individual, or corporation engaging in any "trade, business, profession, vocation or calling" within their corporate limits.¹ Pursuant to this authority, the City of Little Rock and the City of North Little Rock have for some years imposed annual license taxes on a broad variety of businesses, occupations, and professions.² Charitable organizations which engage in the activities affected are relieved from paying the taxes.

[Ordinance Amendments]

In 1957 the two cities added identical amendments to their occupation license tax ordinances. These amendments require that any organization operating within the municipality in question must supply to the City Clerk, upon request and within a specified time, (1) the official name of the organization; (2) its headquarters or regular meeting place; (3) the names of the officers, agents, servants, employees, or repre-

sentatives, and their salaries; (4) the purpose of the organization; (5) a statement as to dues, assessments, and contributions paid, by whom and when paid, together with a statement reflecting the disposition of the funds and the total net income; (6) an affidavit stating whether the organization is subordinate to a parent organization, and if so, the latter's name. The ordinances expressly provide that all information furnished shall be public and subject to the inspection of any interested party at all reasonable business hours.³

3. The pertinent provisions of the ordinances are as follows:

"Whereas, it has been found and determined that certain organizations within the City * * * have been claiming immunity from the terms of [the ordinance], governing the payment of occupation licenses levied for the privilege of doing business within the city, upon the premise that such organizations are benevolent, charitable, mutual benefit, fraternal or non-profit, and

"Whereas, many such organizations claiming the occupation license exemption are mere subterfuges for businesses being operated for profit which are subject to the occupation license ordinance;

"Now, Therefore, Be It Ordained by the City Council of the City * * *:

"Section 1. The word 'organization' as used herein means any group of individuals, whether incorporated or unincorporated.

"Section 2. Any organization operating or functioning within the City * * * including but not limited to civic, fraternal, political, mutual benefit, legal, medical, trade, or other organization, upon the request of the Mayor, Alderman, Member of the Board of Directors, City Clerk, City Collector, or City Attorney, shall list with the City Clerk the following information within 15 days after such request is submitted:

"A. The official name of the organization.

"B. The office, place of business, headquarters or usual meeting place of such organization.

"C. The officers, agents, servants, employees or representatives of such organization, and the salaries paid to them.

"D. The purpose or purposes of such organization.

"E. A financial statement of such organization, including dues, fees, assessments and/or contribu-

1. Ark. Stat., 1947, § 19-4601.

2. Little Rock Ord. No. 7444. North Little Rock Ord. No. 1786. These ordinances have been amended numerous times by adding various businesses, occupations and professions to be licensed, and by changing the rates of the taxes imposed.

[Information Supplied]

Petitioner Bates was the custodian of the records of the local branch of the National Association for the Advancement of Colored People in Little Rock, and petitioner Williams was the custodian of the records of the North Little Rock branch. These local organizations supplied the two municipalities with all the information required by the ordinances, except that demanded under § 2E of each ordinance which would have required disclosure of the names of the organizations' members and contributors. Instead of furnishing the detailed breakdown required by this section of the North Little Rock ordinance, the petitioner Williams wrote to the City Clerk as follows:

"E. The financial statement is as follows:
January 1, 1957 to December 4, 1957.

Total receipts from membership and contributors \$252.00.

Total expenditures \$183.60
(to National Office)

Secretarial help 5.00

Stationery, stamps, etc. 3.00

Total \$191.60

On Hand 60.40

"F. I am attaching my affidavit as president indicating that we are a Branch of the National Association for the Advancement of Colored People, a New York Corporation.

"We cannot give you any information with respect to the names and addresses of

tions paid, by whom paid, and the date thereof, together with the statement reflecting the disposition of such sums, to whom and when paid, together with the total net income of such organization.

"F. An affidavit by the president or other officiating officer of the organization stating whether the organization is subordinate to a parent organization, and if so, the name of the parent organization.

"Section 3. This ordinance shall be cumulative to other ordinances heretofore passed by the City with reference to occupation licenses and the collection thereof.

"Section 4. All information obtained pursuant to this ordinance shall be deemed public and subject to the inspection of any interested party at all reasonable business hours.

"Section 5. Any section or part of this ordinance declared to be unconstitutional or void shall not affect the remaining sections of the ordinance, and to this end the sections or subsections hereof are declared to be severable.

"Section 6. Any person or organization who shall violate the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined * * *."

our members and contributors or any information which may lead to the ascertainment of such information. We base this refusal on the anti-NAACP climate in this state. It is our good faith and belief that the public disclosure of the names of our members and contributors might lead to their harassment, economic reprisals, and even bodily harm. Moreover, even aside from that possibility, we have been advised by our counsel, and we do so believe that the city has no right under the Constitution and laws of the United States, and under the Constitution and laws of the State of Arkansas to demand the names and addresses of our members and contributors. We assert on behalf of the organization and its members the right to contribute to the NAACP and to seek under its aegis to accomplish the aims and purposes herein described free from any restraints or interference from city or state officials. In addition we assert the right of our members and contributors to participate in the activities of the NAACP, anonymously, a right which has been recognized as the basic right of every American citizen since the founding of this country * * *."

A substantially identical written statement was submitted on behalf of the Little Rock branch of the Association to the Clerk of that city.

[Convictions and Fines]

After refusing upon further demand to submit the names of the members of their organizations,⁴

4. Section 2E of the ordinances does not explicitly require submission of membership lists, but, rather, of "dues * * * and/or contributions paid, by whom paid * * *." That the effect of this language was to require submission of the names of all members was made clear in the supplemental request made by the City Clerk of North Little Rock to the petitioner Williams:

"Dear Madam:

"At a regular meeting of the North Little Rock City Council held in the Council Chamber on December 9, 1957, I was instructed to request a list of the names and addresses of all the officers and members of the North Little Rock Branch of the NAACP.

"This portion of the questionnaire answered by you on December 4, 1957 did not furnish this information. The above information must be received not later than December 18, 1957 as requested in the original questionnaire received by you on December 3, 1957."

(In fact, the names of all the officers of the North Little Rock branch had already been submitted in accordance with § 2C of the ordinance.)

each petitioner was tried, convicted, and fined for a violation of the ordinance of her respective municipality. At the Bates trial evidence was offered to show that many former members of the local organization had declined to renew their membership because of the existence of the ordinance in question.⁵ Similar evidence was received in the Williams trial,⁶ as well as evidence that those who had been publicly identified in the community as members of the National Association for the Advancement of Colored People had been subjected to harassment and threats of bodily harm.⁷

On appeal the cases were consolidated in the Supreme Court of Arkansas, and, with two justices dissenting, the convictions were upheld. Ark., 319 S.W.2d 37, 43. The court concluded that compulsory disclosure of the membership lists under the circumstances was "not an unconstitutional invasion of the freedoms guaranteed * * *" but "a mere incident to a permissible legal result."⁸ Because of the significant constitutional question involved, we granted certiorari. 359 U.S. 988, 79 S.Ct. 1118, 3 L.Ed.2d 977.

Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the

foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. U.S. Const., Amend. I. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States. *De Jonge v. State of Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278; *N. A. A. C. P. v. State of Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488.

[Subtle Interference Barred]

Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402, 70 S.Ct. 674, 685, 94 L.Ed. 925; *N. A. A. C. P. v. State of Alabama*, supra; *Smith v. People of State of California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective * * * restraint on freedom of association. * * * This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *N. A. A. C. P. v. State of Alabama*, 357 U.S. at page 462, 78 S.Ct. at page 1171.

On this record it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members.⁹ There was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had

5. For example, petitioner Bates testified: "Well, I will say it like this—for the past five years I have been collecting, I guess, 150 to 200 members each year—just renewals of the same people. This year, I guess I lost 100 or 150 of those same members because when I went back for renewals they said, 'Well, we will wait and see what happens in the Bennett Ordinance.'"

6. For example, a witness testified: "Well, the people are afraid to join, afraid to join because the people—they don't want their names exposed and they are afraid their names will be exposed and they might lose their jobs. They will be intimidated and they are afraid to join. They said, 'Well, you will have to wait. I can't do it.' They are afraid to give their—because they are afraid somebody, if their names are publicized, then they will lose their jobs or be intimidated or what-not."

7. For example, petitioner Williams testified: "Well, I have—we were not able to rest at night or day for quite a while. We had to have our phone number changed because they call that day and night and then we—they have found out the second phone number and they did the same way and they called me all hours of night over the telephone and then I had to get a new number and they have been trying to find out that one, of course. I would tell them who is talking and they have thrown stones at my home. They wrote me—I got a—I received a letter threatening my life and they threaten my life over the telephone. That is the way."

8. The Arkansas Supreme Court construed § 2E of the ordinances as requiring disclosure "of the membership list." Ark., 319 S.W.2d at page 41.

9. The cities do not challenge petitioners' right to raise any objections or defenses available to their organizations, nor do the cities challenge the right of the organizations in these circumstances to assert the individual rights of their members. Cf. *N. A. A. C. P. v. State of Alabama*, 357 U.S. 449, at pages 458–459, 78 S.Ct. 1183, at pages 1169–1170.

been followed by harassment and threats of bodily harm. There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw. This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names. *N. A. A. C. P. v. State of Alabama*, 357 U.S. at page 463, 78 S.Ct. at page 1172. Thus, the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote.

[*Nature of State's Interest*]

Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *N. A. A. C. P. v. State of Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488. See also *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643; *Schneider v. State of New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; *Cox v. State of New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049; *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513.

It cannot be questioned that the governmental purpose upon which the municipalities rely is a fundamental one. No power is more basic to the ultimate purpose and function of government than is the power to tax. See *James v. Dravo Contracting Co.*, 302 U.S. 134, 150, 58 S.Ct. 208, 216, 82 L.Ed. 155. Nor can it be doubted that the proper and efficient exercise of this essential governmental power may sometimes entail the possibility of encroachment upon individual freedom. See *United States v. Kahriger*, 345 U.S.

22, 73 S.Ct. 510, 97 L.Ed. 754; *Hubbard v. Mellon*, 55 App.D.C. 341, 5 F.2d 764.

[*A Reasonable Relationship?*]

It was as an adjunct of their power to impose occupation license taxes that the cities enacted the legislation here in question.¹⁰ But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

In this record we can find no relevant correlation between the power of the municipalities to impose occupation license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People. The occupation license tax ordinances of the municipalities are squarely aimed at reaching all the commercial, professional, and business occupations within the communities. The taxes are not, and as a matter of state law cannot be, based on earnings or income, but upon the nature of the occupation or enterprise conducted.

[*NAACP's Answer to Inquiry*]

Inquiry of organizations within the communities as to the purpose and nature of their activities would thus appear to be entirely relevant to enforcement of the ordinances. Such an inquiry was addressed to these organizations and was answered as follows:

"We are an affiliate of a national organization seeking to secure for American Negroes their rights as guaranteed by the Constitution of the United States. Our purposes may best be described by quoting from the Articles of Incorporation of our National Organization where these purposes are set forth as:

"* * * voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens;

10. See note 3, *supra*.

to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law. To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any kind and all things which may lawfully be done by a membership corporation organized under the laws of the State of New York for the further advancement of these objects.'

'The Articles of Incorporation hereinabove referred to are on file in the office of the Secretary of State of the State of Arkansas. In accord with these purposes and aims, [this] * * * Branch, NAACP was chartered and organized, and we are seeking to effectuate these principles within [this municipality].'

[Failure to Show Justification]

The municipalities have not suggested that an activity so described, even if conducted for profit, would fall within any of the occupation classifications for which a license is required or a tax payable. On oral argument counsel for the City of Little Rock was unable to relate any activity of these organizations to which a license tax might attach.¹¹ And there is nothing in the record to indicate that a tax claim has ever been asserted against either organization. If the organizations were to claim the exemption which the ordinance grants to charitable endeavors, information as to the specific sources and expenditures of their funds might well be a subject of relevant inquiry. But there is nothing to show that any exemption has ever been sought, claimed, or granted—and positive evidence in the record to the contrary.

In sum, there is a complete failure in this record to show (1) that the organizations were

engaged in any occupation for which a license would be required, even if the occupation were conducted for a profit; (2) that the cities have ever asserted a claim against the organizations for payment of an occupation license tax; (3) that the organizations have ever asserted exemption from a tax imposed by the municipalities, either because of their alleged nonprofit character or for any other reason.

We conclude that the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause. The petitioners cannot be punished for refusing to produce information which the municipalities could not constitutionally require. The judgments cannot stand.

Reversed.

Concurring Opinion

Mr. Justice BLACK and Mr. Justice DOUGLAS, concurring.

We concur in the judgment and substantially with the opinion because we think the facts show that the ordinances as here applied violate freedom of speech and assembly guaranteed by the First Amendment which this Court has many times held was made applicable to the States by the Fourteenth Amendment, as for illustration in *Jones v. City of Opelika*, 316 U.S. 584, at page 600, 62 S.Ct. 1231, at page 1240, 86 L.Ed. 1691, dissenting opinion adopted by the Court in 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290; *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, at page 108, 63 S.Ct. 870, at page 872, 87 L.Ed. 1292; *Kingsley Intern. Pictures Corp. v. Regents*, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512. And see cases cited in *Speiser v. Randall*, 357 U.S. 513, 529, at page 530, 78 S.Ct. 1332, 1343, at pages 1352, 1353, 2 L.Ed.2d 1460 (concurring opinion).

Moreover, we believe, as we indicated in *United States v. Rumely*, 345 U.S. 41, 48, at page 56, 73 S.Ct. 543, 547, at page 550, 97 L.Ed. 770 (concurring opinion), that First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other

11. A "catch-all" provision of the Little Rock ordinance imposes an annual tax upon "[a]ny person, firm, or corporation within the City * * * engaging in the business of selling any and all kinds of goods, wares, and merchandise, whether raw materials or finished products, or both, from a regularly established place of business maintained within the City * * *." The tax is measured by "the gross value of the average stock inventory for the preceding year," with a minimum of \$25. It was conceded on oral argument by counsel for the City of Little Rock that this provision was inapplicable. No brief was filed nor oral argument made on behalf of the City of North Rock.

First Amendment right as *N. A. A. C. P. v. State of Alabama*, 357 U.S. 449, at page 460, 78 S.Ct. 1163, at page 1170, 2 L.Ed. 2d 1488, and *De Jonge v. State of Oregon*, 299 U.S. 353, at page 363, 57 S.Ct. 255, at page 259, 81 L.Ed.

278, hold. These are principles applicable to all people under our Constitution irrespective of their race, color, politics, or religion. That is, for us, the essence of the present opinion of the Court.

MISCELLANEOUS ORDERS

The United States Supreme Court:

Appeal dismissed:

Stuart v. Wilson (Prior decisions 80 S.Ct. 368, 4 Race Rel. L. Rep. 849 [1959] in which the United States Supreme Court dismissed the appeal for want of a substantial federal question). No. 495, February 29, 1960, 80 S.Ct. 609, petition for rehearing denied; April 25, 1960, 80 S.Ct. 874, order: "The motion to recall and amend judgment is granted. The order of January 11, 1960, 361 U.S. 232, 80 S.Ct. 368, 4 L.Ed.2d 350, is vacated, and the motion to dismiss is granted and the appeal is dismissed for want of jurisdiction."

Probable jurisdiction on appeal noted:

Gallagher v. Crown Kosher Super Market of Massachusetts, Inc. (Prior decision 176 F.Supp. 466, 4 Race Rel. L. Rep. 1016 [D. Mass. 1959]; docketed 28 L.W. 3167, 4 Race Rel. L. Rep. 853). No. 532, April 25, 1960, 80 S.Ct. 876, order: "The motion of George Michaels et al. for leave to intervene is denied. In this case probable jurisdiction is noted."

Denied petition for rehearing:

Federal Power Commission v. Tuscarora Indian Nation; Power Authority of State of New York v. Tuscarora Indian Nation (Prior decision 80 S.Ct. 543, 5 Race Rel. L. Rep. 16, *supra* [1960]). Nos. 63, 66, April 18, 1960, 80 S.Ct. 858.

Granted certiorari (i.e., agreed to review):

Braden v. United States (Prior decision 272 F.2d 653, 5 Race Rel. L. Rep. 176, *infra* [5th Cir. 1959]). No. 779, April 25, 1960, 80 S.Ct. 878, order: "Petition for writ of certiorari granted to the United States Court of Appeals for the Fifth Circuit and the case set for argument immediately preceding No. 703."

Bullock v. South Carolina (Prior decision 111 S.E.2d 657, 5 Race R. L. Rep. 221, *infra*, [S.C. Supreme Court, 1959]. No. 842 Misc., May 2 1960, 80 S.Ct. 959, order: "Order for leave to proceed in forma pauperis and petition for writ of certiorari to the Supreme Court of South Carolina granted. Case transferred to the appellate docket."

Gomillion v. Lightfoot (Prior decision 270 F.2d 594, 4 Race Rel. L. Rep. 993 [5th Cir. 1959]; docketed 28 L.W. 3235, 4 Race Rel. L. Rep. 853). No. 668, March 21, 1960, 80 S.Ct. 669.

Monroe v. Pape (Prior decision 272 F.2d 365, 5 Race Rel. L. Rep. 108, *infra* [7th Cir. 1959]). No. 712, March 28, 1960, 80 S.Ct. 756.

Denied certiorari (i.e., declined to review):

Galloway v. Warden of the Maryland Penitentiary (Prior decision 157 A.2d 284, 5 Race Rel. L. Rep. 231, *infra* [Md. Court of Appeals, 1960]). No. 704 Misc., March 21, 1960, 80 S.Ct. 680.

Hall v. Georgia (Prior decision 215 Ga. 375, 110 S.E.2d 661, 4 Race Rel. L. Rep. 1044 [Ga. Supreme Court, 1959] affirming the decision of a state trial court dismissing a motion for new trial, by a Negro who had been convicted of manslaughter, on ground that question of systematic exclusion of Negroes in jury selection had been waived when defendant failed to challenge the array before indictment and to file a plea in abatement after indictment). No. 565 Misc., March 7, 1960, 80 S.Ct. 665.

Harris v. Illinois (Prior decision 17 Ill. 2d 446, 161 N.E.2d 809, 4 Race Rel. L. Rep. 1048 [Ill. Supreme Court, 1959]; docketed 28 L.W. 3247, 4 Race Rel. L. Rep. 853). No. 707, March 28, 1960, 80 S.Ct. 755.

Rivers v. United States (Prior decision 270 F.2d 435, 4 Race Rel. L. Rep. 1048 [9th Cir. 1959] in affirming district court conviction of Negro for murder, overruling contention that court below erred in ruling out as improper defense counsel's question to prospective juror, "Would you object to a Negro living in an apartment next to yours?" such question not being germane to whether juror would be so racially prejudiced as to prevent or make difficult a fair or impartial verdict). No. 355 Misc., March 21, 1960, 80 S.Ct. 674.

Other orders:

Shelton v. McKinley (Prior decision 80 S.Ct. 401, 4 Race Rel. L. Rep. 849 [1959] in which the Supreme Court of the United States noted probable jurisdiction on appeal). No. 541, April 25, 1960, 80 S.Ct. 876, order:

"The joint motion to substitute John E. Fox as a party appellee in the place of Ralph Mitchell, Jr., and to name Charles v. Kalkbrenner as a party appellee instead of J. C. Langley is granted. The motion to substitute Everett Tucker, Jr., as President of the Board of Directors of the Little Rock Special School District, J. H. Cottrell, B. F. Mackey, and W. C. McDonald as parties appellee in the place of Ed I. McKinley, Jr., Ben D. Rowland and Robert W. Laster is granted."

Cases docketed:

Air Line Stewards and Stewardesses Association v. Northwest Airlines, Inc. (Prior decision 273 F.2d 69, 5 Race Rel. L. Rep. 129, *infra* [2d Cir. 1959]). No. 782, March 11, 1960, 28 L.W. 3271.

Bernstein v. Real Estate Commission of Maryland (Prior decision 221 Md. 221, 156 A.2d 657, 5 Race Rel. L. Rep. 153, *infra* [Md. Court of Appeals, 1959]). No. 852, April 11, 1960, 28 L.W. 3309.

Levitt and Sons, Inc. v. Division Against Discrimination (Prior decision 158 A.2d 177, 5 Race Rel. L. Rep. 160, *infra* [N.J. Supreme Court, 1960]). No. 865, April 15, 1960, 28 L.W. 3309.

Wold v. Shoreline School District (Prior decision *State of Washington ex rel. Shoreline School District* No. 412 v. *Superior Court for King County, Juvenile Court*, 346 P.2d 999, 5 Race Rel. L. Rep. 94, *infra* [Wash. Supreme Court, 1959]). No. 879, April 22, 1960, 28 L.W. 3326.

COURTS

EDUCATION

Public Schools—Arkansas

Earnestine DOVE, A Minor, by her Father and Next Friend, William Dove, et al. v. Lee PARHAM, President of Board of Directors, Dollarway School District Number 2, Jefferson County, Arkansas, Members of Board of Directors, Charles L. Fallis, Superintendent of Public Schools, and the Dollarway School District Number 2, A Corporation.
Lee PARHAM, etc. v. Earnestine DOVE, etc.

United States District Court, Eastern District of Arkansas, Western Division, July 31, 1959, 176 F. Supp. 242.

United States Court of Appeals, Eighth Circuit, October 8, 1959, 271 F.2d 132.

SUMMARY: Three Negro students, alleging that their schools are racially segregated, brought a class action in federal court against a Jefferson County, Arkansas, school district and its board of directors, seeking an order requiring defendants to admit them immediately to a particular school in the district without regard to the state Pupil Assignment Law of 1956 [1 Race Rel. L. Rep. 579, 1077 (1956)], which was in effect at the time the action was brought, or to the state Pupil Placement Act of 1959 [4 Race Rel. L. Rep. 747 (1959)], which was in effect at the time the action came to trial. Because plaintiffs demanded that both statutes be declared unconstitutional, a three-judge court was convened; but, finding the statutes not unconstitutional on their faces, that court dissolved itself. On subsequent trial, the single-judge court declared both acts to be constitutional on their face because virtually identical to the Alabama School Placement Law upheld in *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101, 3 Race Rel. L. Rep. 867 (1958). However, a motion to dismiss for failure to exhaust administrative remedies under the 1956 Act was denied. The court found that throughout the 1957-59 period during which plaintiffs had sought admission to district white schools, defendants had maintained a "rigid" racial segregation policy, that they intended to continue such policy unchanged, and that the board's profession that the 1956 Act had been applied and was operating during the 1957-59 period was "but a cover-up to conceal its anti-racial and pro-racial segregation attitude." Therefore, although technically plaintiffs had not exhausted all administrative remedies under the Act, the court held that "actually" they had done so when three applications for admission had already been denied and a further petition for a board hearing would have been futile. The court found that plaintiffs had been illegally denied admission to white schools solely because of race and defendant's anti-integration policy, there being no proof that plaintiffs did not have the same qualifications as white children admitted; and the record was found to constitute prima facie proof of plaintiffs' qualifications which "necessarily arises out of American citizenship, school age status and residence in the district," and which defendants had failed to overcome by showing a good faith application of the Pupil Enrollment Act. Defendants were therefore ordered to admit plaintiffs to district white schools at the beginning of the 1959-1960 school year, enjoined from engaging in acts which would impede the progress of plaintiffs as they attend such schools, and ordered to proceed with and apply the rules prescribed by the 1959 Act, the court retaining jurisdiction. On appeal, the Court of Appeals for the Eighth Circuit affirmed the holding that the Acts of 1956 and 1959 were not unconstitutional on their faces, reversed the holding that defendants were not entitled to invoke the 1959 Act in this case and that plaintiffs were not required to exhaust the administrative remedies provided by the

Acts, and vacated the injunction directing plaintiffs' admission to the school they sought to attend. Stating that the assignment statute could properly be disregarded by the courts before its use only upon a legal certainty that it would be applied as a subterfuge for effecting an unconstitutional result, the court ruled that it could not be legally said that resort by plaintiffs to the statute would have resulted in such application against them as to make such resort a useless act. The court directed, however, that defendants be enjoined from continuing to maintain segregation and that the proceeding be allowed to remain open on the records of the district court to permit the filing of a supplemental complaint, if any, in case of an unconstitutional application of the 1959 Act, or any other unconstitutional action, by defendants against plaintiffs. The order of the three-judge district court, the decision of the one-judge district court, and the decision and opinion of the court of appeals follow.

ORDER

PER CURIAM.

Upon due consideration of the motion of the defendants that the Three-Judge Court designated to hear this case be dissolved and for a summary judgment,

IT IS ORDERED that the Three-Judge Court be dissolved; that the motion for summary judgment be denied without prejudice, and that the case be assigned to Honorable Axel J. Beck, United States District Judge, for trial and determination.

This May 25, 1959.

OPINION

BECK, District Judge.

This is a class action¹, in equity, brought by school-age children of the Negro race and their parents and others similarly situated, as plaintiffs, against the members of the Board of Directors of the Dollarway School District No. 2, Jefferson County, Arkansas, and that district, a corporation, with jurisdiction invoked under 28 U.S.C.A. §§ 1331 as amended and 1343(3) and 42 U.S.C.A. §§ 1981-1983.

[Question Raised]

The controversy, in main, raises the question as to the merits of the plaintiffs' claims, that the acts and deeds of the defendants while acting or purporting to act pursuant to the laws of Arkansas, (1) in providing public schools for the plaintiffs and the class of persons they represent, on a segregated and separate basis because of race and color alone, and (2) assigning and compelling them to attend and denying them the right to enter, enroll, register and receive instructions in the schools open to all other chil-

dren of school-age in that district, constitutes a denial of rights and privileges secured and guaranteed to them as citizens under the Constitution and laws of the United States. As remedies, they seek (1) injunctive relief against enforcement, execution or operation of the statutes, rules and regulations of which they complain and (2) a declaratory judgment answering the following questions:

"Whether the acts and deeds of defendants, or either of them, while acting or purporting to act pursuant to the laws of the State of Arkansas, or while acting under color of Arkansas laws, of providing public schools for plaintiffs on a separate and segregated basis because of the race and color of plaintiffs and assigning plaintiffs to separate and segregated public schools on the classification of race alone and of forcing and compelling plaintiffs to enroll in and attend such separate and segregated schools because of their race and color, deny to plaintiffs and the class of persons that they represent, their privileges and immunities as citizens of the United States, and the equal protection of the laws secured to them by the Fourteenth Amendment to the Constitution of the United States, or rights and privileges secured to them by Sections 1981 or 1983, of Title 42, United States Code, and are, for those reasons, unconstitutional and void?

"Whether the acts and deeds of defendants, or either of them, while acting or purporting to act pursuant to the laws of the State of Arkansas, or while acting under color of Arkansas laws, of denying and refusing minor plaintiffs and the members of the class of persons that they represent, the right and privilege of registering, enrolling, entering, attending classes and receiving instruction in the public schools within the

1. Class action under Rule 23(a) (3), Fed. Rules Civ. Proc. 28 U.S.C.A.

Dollarway School District Number 2 and under their supervision and control at the same time and under the same terms and conditions that all other minor residents of said district are permitted to register, enroll, enter, attend classes and receive instruction without any distinctions, restrictions, limitations or deprivations being made as to them because of, or on the basis of classification of, race or color, deny to minor plaintiffs and the members of the class of persons that they represent, privileges and immunities guaranteed to them as citizens of the United States, or the equal protection of the laws secured to them by Sections 1981 and 1983, of Title 42, United States Code, and are, for those reasons, unconstitutional and void?²

[Other Questions]

Other questions to be settled and determined are those which arise (1) on defendants' motion challenging the court's jurisdiction, (2) on another for summary judgment, (3) on one to reassign to a three-judge district court, under 28 U.S.C.A. §§ 2281 and 2284, should constitutional questions of a substantial nature be raised, and (4) on one more to dismiss the plaintiffs' complaint on the ground that the plaintiffs prior to the time of the commencement of the suit failed to exhaust administrative remedies under the Arkansas Pupil Enrollment Act of 1956.³

As to (1) suffice it to say that the case clearly is within one or more of 28 U.S.C.A. § 1331 as amended and 42 U.S.C.A. § 1983 and that the motion, therefore, must be denied. *Shuttlesworth v. Birmingham Board of Education*, D. C., 162 F.Supp. 372, affirmed 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145.

The Arkansas Pupil Assignment Act of 1959⁴, which repeals the Arkansas Pupil Enrollment Act of 1956, insofar as its provisions are in conflict therewith and which as to terms is in all material respects identical to the School Placement Law of Alabama, is *constitutional on its face*, since its provisions assure equal rights to all children in any Arkansas school district, as

pupil assignments are made. Like conclusion as to *constitutionality on its face*, is also reached as to the Arkansas Pupil Enrollment Act of 1956, since its terms and provisions conform substantially to those in the Alabama and the other Arkansas Act. *Shuttlesworth v. Birmingham Board of Education of Jefferson County, Alabama*, D.C. 1958, 162 F.Supp. 372, affirmed 358 U.S. 101, 79 S.Ct. 221.

[Newport News Case]

Against that conclusion, the plaintiffs, mainly on the authority of *Atkins v. School Board of City of Newport News*, D.C.1957, 148 F.Supp. 430, affirmed 4 Cir., 1957, 246 F.2d 325, certiorari denied 1957, 355 U.S. 855, 78 S.Ct. 83, 2 L.Ed. 2d 63, contend that the Pupil Assignment Laws of Arkansas, even without its Acts 4 and 5—both having been declared unconstitutional and void on June 18, 1959⁵—were a part of a plan and a scheme by the people of that state and its duly authorized representatives to maintain its traditional system of racial segregation in its public schools and to nullify the decisions in *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and in *Brown v. Board of Education*, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and that they for that reason were unconstitutional and void.

Such a contention is not supported by the *Atkins v. School Board of City of Newport News* case, *supra*. The Virginia Pupil Placement Laws were held unconstitutional and void under that

5. Arkansas Acts 4 and 5 of 1958 (2nd Ex.Sess.), as amended by Act 151, Ark. Acts of 1959.

A three-judge court in *Aaron v. McKinley*, D.C.E.D.Ark.1959, 173 F.Supp.944, 950, held those Acts unconstitutional. The opinion, insofar as it relates to that point, states: "With all due respect to the considered views of those Justices of the Supreme Court of Arkansas who concluded that Act No. 4 represented a valid exercise of the police power of the State and therefore did not violate the Fourteenth Amendment to the Constitution of the United States, we are firmly of the opinion that Act No. 4 cannot be sustained upon that ground, and is clearly unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment, and conferred no authority upon the Governor to close the public high schools in Little Rock." And further they declared: "Since Act No. 5 is complementary to and dependent upon Act No. 4, and that Act is invalid, it follows that Act No. 5 is also invalid and completely ineffectual. We are satisfied that Act No. 5, as amended, cannot stand alone and did not, and does not, authorize the State Board of Education to deprive the Little Rock School District of State funds allocable to it for the maintenance of its schools on a constitutional basis, or to divert any part of those funds to other schools or other districts."

2. Plaintiffs' Complaint.

3. Arkansas Pupil Enrollment Act, Initiated Measure No. 2 (Ark.Stat. § 80-1519 et seq.) became effective December 6, 1956.

4. Pupil Assignment Act, Act 461 of the General Assembly of Arkansas (1959) became effective June 11, 1959, [See 4 Race Rel. L. Rep. 747 (1959)].

decision, not because they were a part of a plan for maintaining of segregation and eventual nullifying of the Supreme Court directives against racial discrimination in public schools, but because that plan embraced an Act⁶ in direct conflict with those directives, as it provided for the closing of all public schools, in any school district, and withdrawing of all public support therefrom if and when any racial integration in any school in such a district should take place or be permitted.

[Virginia Act's Defect]

It is true that the court in that case regarded the various anti-racial integration acts in Virginia initiated and sponsored by its Governor, its General Assembly, other duly authorized legal representatives and its people, as a plan and a scheme to circumvent the decision in the Brown cases, yet, the court concluded that background was not fatal on the question of the constitutionality of the Virginia Pupil Placement Act, as it observed:

"* * * Virginia took the additional fatal step of providing for the automatic closing of all schools of the same class in the particular political subdivision as well as the cut-off of funds for such schools, *irrespective of whether any child was assigned to another school pursuant to an administrative remedy or court order.*" Atkins, *supra*, 148 F.Supp. at page 445.

and it gave emphasis to the point as it added:

"In Carson v. Warlick, *supra* [4 Cir., 238 F.2d 724], the appellate court has held that the Pupil Placement Act of North Carolina is not unconstitutional on its face. North Carolina has not provided for either the automatic closing of any schools or the cut-off of state or local funds. Obviously the remedies afforded by North Carolina do not lead to a complete 'blind alley' such as Virginia has prescribed." Atkins, *supra*, 148 F.Supp. at page 445.

In *Shuttlesworth v. Birmingham Board of Education*, *supra*, the court as it considered the constitutionality of the Alabama Pupil Assignment Law, had before it in the record a resistance plan to racial integration in the public

In *Shuttlesworth v. Birmingham Board of Education*, *supra*, the court as it considered the

schools of that state which included: (1) a report of the legislative interim committee, recommending an amendment to its state's constitution under which racial integration would be prohibited in the public schools; (2) enactment of a pupil placement law; (3) adoption of a Resolution of Interposition and Nullification⁷, and (4) under the theory of judicial notice, all other acts and resolutions of the state legislature and other acts by duly authorized representatives of the state evincing hostility to the integration edicts. But the court, even as it referred to that plan, of which the Pupil Placement Law was a part, as one tending to show a strong and definite plan or scheme to circumvent the rule in the segregation cases, held that plan as one not having bearing on the constitutionality of that law as it concluded:

"All that has been said in this present opinion must be limited to the constitutionality of the law *upon its face*. The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that

7. The Resolution of Interposition and Nullification was passed by the Special Session 1956 of the Alabama Legislature and became effective February 2, 1956, Act No. 42. It states: "That until the issue between the State of Alabama and the General Government is decided by the submission to the states, pursuant to Article V of the Constitution, of a suitable constitutional amendment that would declare, in plain and unequivocal language, that the states do surrender their power to maintain public schools and other public facilities on a basis of separation as to race, the Legislature of Alabama declares the decisions and orders of the Supreme Court of the United States relating to separation of races in the public schools are, as a matter of right, null, void, and of no effect; and the Legislature of Alabama declares to all men as a matter of right, this State is not bound to abide thereby; we declare, further, our firm intention to take all appropriate measures honorably and constitutionally available to us, to avoid this illegal encroachment upon our rights, and to urge upon our sister states their prompt and deliberate efforts to check further encroachment by the General Government, through judicial legislation, upon the reserved powers of all states." *Shuttlesworth*, *supra*, 162 F. Supp. at page 380.

The Arkansas Resolution of Interposition states in part: "Therefore, The People of Arkansas, by Popular Vote: * * * 2. Pledge our firm intention to take all appropriate measures, honorably and legally available to us, to resist any and all illegal encroachments upon the powers reserved to the State of Arkansas to order and control its own domestic institutions according to its own exclusive judgment."

6. Act Va.1956, Ex.Sess., c. 70 §§ 1 et seq., 2, 2a, 3 (1-8), 4-11.

it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the state." *Shuttlesworth*, supra, 162 F.Supp. at page 384.

[Planned Integration Resistance Insignificant]

Implicit, in the rules applied in those cases and controlling on the Arkansas Pupil Assignment Laws being within constitutional boundaries is the principle, that a state plan for resistance to racial integration in its public schools, is without significance as to the constitutionality of such laws if legitimate and constitutional means are used in the operation of the plan and the attainment of its objectives.⁸ *Shuttlesworth v. Birmingham Board of Education*, supra, and *Carson v. Warlick*, 4 Cir., 1956, 238 F.2d 724. It is otherwise, however, if in the process of such resistance a state resorts to enactment of an act which nullifies the integration doctrine. *Atkins v. The School Board of City of Newport News*, supra. See also *Orleans Parish School Board v. Bush*, 5 Cir., 1957, 242 F.2d 156.

The defendants have moved to dismiss the complaint on the ground that the plaintiffs, prior to the commencing of their suit, failed to avail themselves of all of the administrative remedies provided for by the Arkansas Pupil Enrollment Act of 1956.

[Exhaustion of Remedies Unnecessary]

It is true that they didn't. The "exhaustion of administrative remedies rule," which defendants invoke, nevertheless does not apply.

Under this record it is conclusively established, that the superintendents and the officers of the defendant school district and its Board of Directors, throughout the three school years when the plaintiffs, Earnestine Dove, James Edwards Warfield and Corliss Smith, sought admission to the white schools in the district, before that time and since, have had and continue to have and through its superintendents and other managing personnel, have carried into ef-

fect, enforced and maintained, a rigid, racial segregation policy in all of its schools, which, without exception, permitted no entry of any colored child into its white schools. It is established, too, that the Board intends a continuation of that policy, without any change or modifications and that its professing of the Pupil Enrollment Act of 1956 having been applied and in operation during the years 1957, 1958 and 1959, is but a cover-up to conceal its anti-racial and pro-racial segregation attitude.

These are the facts. The record permits no other conclusion. Dove, Warfield and Smith exhausted their administrative remedies, actually, under the Act, as they applied for admission the first time and were denied. They got the same results as they made their second and third attempt. Another one, on a petition for hearing before the Board, would indeed have been futile and therefore not required as a requisite to the commencement of this suit.

[Bush v. Orleans Parish School Board]

A factual situation, substantially like this one, was before the court in the case of *Bush v. Orleans Parish School Board*, D.C.E.D.La.1956, 138 F.Supp. 337, 341, where it was said:

"As a practical matter, plaintiffs here have exhausted their administrative remedies. They have petitioned the Board on three separate occasions asking that their children be assigned to non-segregated schools. The Board not only has refused to desegregate the schools, but has passed a resolution noting the existence of the present suit and stating, 'It is not only to the manifest interest of this Board and in accord with its expressed policy, but also in furtherance of the public welfare of this community that this suit and any others that might be instituted with the same objective be vigorously, aggressively, and capably defended.' To remit each of these minor children and the thousands of others similarly situated to thousands of administrative hearings before this Board, to seek the relief to which the Supreme Court of the United States has said they are entitled, would be a vain and useless gesture, unworthy of a court of equity. It would be a travesty in which this court will not participate."

That case was affirmed in the case of *Orleans*

8. *Cooper v. Aaron*, 358 U.S. 1, at page 24, 78 S.Ct. 1401, at page 1413, 3 L.Ed. 2d 5: "The duty to abstain from resistance to 'the supreme Law of the Land,' U.S.Const., Art. VI § 2, as declared by the organ of our Government for ascertaining it, does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stifled. Active obstruction or defiance is barred."

Parish School Board v. Bush, 5 Cir., 1957, 242 F.2d 156.

Again in the case of School Board of City of Charlottesville v. Allen, 4 Cir., 1956, 240 F.2d 59, 60, we have the following comment by Chief Judge Parker:

"Equity does not require the doing of a vain thing as a condition of relief."

See also Bruce v. Stilwell, 5 Cir., 1953, 206 F.2d 554, and Parker v. Lester, D.C. N.D.Cal., S.D. 1953, 112 F.Supp. 433.

[School Board's Duties]

A reminder as to the duties of a school board intrusted with the implementation of the integration doctrine and administration of a pupil assignment law, clearly, at this point is in order.

The area in which school boards in the course of their administration of their school district may operate, be it within or without pupil assignment laws, are referred to in the case of Briggs v. Elliott, D.C.E.D.S.C.1955, 132 F.Supp. 776, at page 777:

"Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids

the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

quoted with approval in Avery v. Wichita Falls Independent School District, 5 Cir., 1957, 241 F.2d 230, and in School Board of City of Charlottesville v. Allen, supra.

[Extent of Board's Powers]

Again in Thompson v. County School Board of Arlington County, D.C.E.D.Va. 1956, 144 F.Supp. 239, there are other indications as to the extensiveness of a board's powers:

"It must be remembered that the decisions of the Supreme Court of United States in Brown v. Board of Education, 1954, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 and 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of that Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads, may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate," which language is quoted with approval in the per curiam opinion of the Court of Appeals for the Fourth Circuit in School Board of City of Newport News, Virginia v. Atkins, 1957, 246 F.2d 325.

[The Brown Case]

There are restrictions, however, on such powers. Those are referred to in Brown v. Board of Education, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, where it is said:

"Full implementation of these constitutional principles may require solution of varied local school problems. School au-

thorities have the primary responsibility for elucidating, assessing, and solving these problems; *courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.*" (Emphasis supplied.)

The court in that case continued:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies⁹ and by a facility for adjusting and reconciling public and private needs.¹⁰ These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. *But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.*

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance

areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases." (Emphasis supplied.)

[Cooper v. Aaron]

Again in the case of Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 1409, 3 L.Ed. 2d 5:

"In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, *nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'*" (Last emphasis supplied.) Smith v. Texas, 311 U.S. 128, 132, 61 S.Ct. 164, 166, 85 L.Ed. 84."

The defendants by answer admit: (1) "that plaintiffs are citizens of the United States, the state of Arkansas, and are domiciled in Jefferson County"; (2) "that the minor plaintiffs heretofore have attended the public schools of the defendant district," and (3) "that the defendants have not heretofore had, nor do they now have, any knowledge of any disqualification of any of the minor plaintiffs from attending the said schools."

The proof, as heretofore found and declared shows the plaintiffs, Dove, Warfield and Smith, to have been denied admission to the white schools, only because of race and the Board's anti-integration policy and none to prove that they did not have the same qualifications as the white children who were admitted.

[Presumptions of Qualifications]

That record constituted prima facie proof of the qualifications of Dove, Warfield and Smith for admission to the white schools where they applied. It was then for the defendants, under

9. See Alexander v. Hillman, 296 U.S. 222, 239, 56 S.Ct. 204, 80 L.Ed. 192.

10. See Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S.Ct. 587, 88 L.Ed. 754.

the affirmative defenses in their answer, to counter with proof that the Pupil Enrollment Act in good faith had been and was being applied and that those plaintiffs pursuant to the terms of that Act had been properly classified and assigned. They failed in this respect as heretofore shown and determined. Plaintiffs' prima facie case, on this point, remains undisturbed. And the presumptions of qualification for admission to any public school in the defendant district, which necessarily arises out of American citizenship, school age status and residence in the district hasn't been overcome. 44 Iowa L.Rev. 147 (1958).

The Court for these reasons and others discussed, finds that the plaintiffs, Dove, Warfield and Smith, had the necessary admission qualifications; that their applications were illegally denied and that they must be admitted to the white schools in the defendant district as the 1959-1960 school year is commenced.

For the reasons assigned in the discussion of the question before the court under this record and the rules referred to in the authorities, it is held that there is no basis for a reassignment of the case to a three-judge court under 28 U.S.C.A. §§ 2281 and 2284.

[Judgment and Declaration]

It is the judgment and declaration of this court: (1) that the Arkansas Pupil Enrollment

Act of 1956 was constitutional on its face; (2) that the Arkansas Pupil Assignment Act of 1959 is constitutional on its face; (3) that the Board of Directors of the Dollarway School District No. 2 of Jefferson County, Arkansas, its individual members, the defendant School District itself, its Superintendent and Officers, and their successors in office, be, and they are hereby directed to admit the plaintiffs, Earnestine Dove, James Edwards Warfield and Corliss Smith, or either of them, as pupils, to the white schools in the district, at the beginning of the 1959-1960 school year and that they, the said defendants and each of them, and their successors in office, be, and they are hereby permanently enjoined from engaging in any act or acts, which within the doctrine of *Brown v. Board of Education* (1954 and 1955) cases, *supra*, will directly or indirectly impede, thwart, delay or frustrate, the progress of said plaintiff children as they attend such schools; (4) that the defendants and each of them and their successors in office, forthwith, but not later than the beginning of the 1959-60 school year in the defendant district, in good faith and within the doctrine enunciated in the aforementioned *Brown v. Board of Education* cases, proceed with and apply the rules and regulations prescribed by the Arkansas Pupil Assignment Act of 1959, and (5) that the court will retain its jurisdiction of the case.

Court of Appeals Order, Opinion

These cases having been duly argued and submitted to the Court, and the Court being fully advised in the premises—

It is hereby Ordered and Decreed as follows:

(1) That the defendants (under the designation in the District Court) should be enjoined, and an injunction is hereby directed to be issued to prevent them, from continuing to maintain the system of unconstitutional segregation, which has heretofore existed in Dollarway School District No. 2.
(2) That, in relation to Case No. 16,327, the holding of the District Court that the Arkansas Pupil Assignment Act of 1959 is not unconstitutional on its face should be and hereby is affirmed.

(3) That the holding of the District Court

that the defendants are nevertheless unentitled to make use of such Assignment Act in determining to what school the plaintiffs may be entitled to be assigned for the current school year, and that the plaintiffs are not required to resort to or exhaust the administrative remedies provided by such Act in relation to such assignment as may be made of them, should be and is hereby reversed, and the mandatory injunction of the District Court directing the defendants to make admission of the plaintiffs in the school system without regard to the provisions of said Act should be and is hereby vacated.

(4) That the present proceeding will be allowed to remain open on the records of

the District Court, to permit of the filing of such supplemental complaint, if any, as might be entitled to be presented to the Court, in case of an unconstitutional application of the provisions of the Pupil Assignment Act of 1959 against the plaintiffs, or of other unconstitutional action on the part of the School District in relation to them.

(5) That, in order to avoid delay in the opening of the school system of the District, the mandate herein should and will be issued forthwith, and the motion of the plaintiffs for stay of such mandate is hereby denied.

(6) That a written opinion will be filed making fuller expression as to the Court's action, and the right to file such opinion is hereby reserved.

September 22, 1959

JOHNSEN, Chief Judge.

Three Negro students (16, 13 and 12 years of age) sought, on the ground of existing segregation, to have the court order their immediate admittance to a particular school, in Dollarway School District Number 2, of Jefferson County, Arkansas, without regard to the provisions of the Arkansas Pupil Assignment Law of 1956,¹ which was in effect at the time the suit was instituted, or to the provisions of the Arkansas Pupil Placement Act of 1959,² which was in effect at the time the action came to trial. Part of the relief for which the plaintiffs prayed was to have the legislative measures declared to be unconstitutional.

Because of the demand for a declaration of unconstitutionality, a three-judge district court was constituted under 28 U.S.C.A. §§ 2281 and 2284. That court, on convening, felt that both the preceding statute and the superseding statute,³ had to be legally regarded as not being unconstitutional facially, and that there was accordingly no occasion for a three-judge court to hear the matter. It therefore dissolved itself and referred the case back to the individual judge,

on whose docket it had arisen, for trial and determination.

[District Court Decree]

On subsequent trial, the single-judge court entered a decree, D.C., 176 F.Supp. 242, declaring both the 1956 and 1959 Acts to be constitutional on their face, but holding that, notwithstanding this fact, the legislative measures were not required to be given application in the situation on the question of the right of the plaintiffs to be admitted to the school involved. The court ordered the Board of Directors and the Superintendent of Schools of the District, and the District itself, as defendants, to admit the plaintiffs unconditionally to the school involved, at the opening of the 1959-1960 school year, but it directed that the defendants employ and apply the Pupil Placement Act of 1959, within the doctrine of the *Brown v. Board of Education* cases, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, as to the rest of the segregation situation of the District.

The principal contention which had been urged by the defendants on the trial was that the plaintiffs had not exhausted the administrative procedures and remedies, for which both the 1956 and the 1959 Acts made provision, as a requirement for obtaining an assignment of them to a different or a particular school, and as a basis for being able to claim a constitutional violation and discrimination; and that they therefore were not entitled to seek judicial relief.

[Appeals Taken]

The defendants took an appeal from the part of the court's decree which required them to make admission of the plaintiffs to the particular school involved, without regard to the provisions of the 1956 and 1959 Acts. The plaintiffs too took an appeal, from the holding of the court that the 1956 and 1959 Acts were constitutional on their face.

Because of the delay which otherwise seemed likely to result in the opening of the 1959-1960 school year of the District, we advanced the appeals for hearing, and they were argued and submitted to us on September 21, 1959. On that same day, after making determination, we announced our decision from the bench, affirming the court's holding on the plaintiffs' appeal,

1. Initiated Act Number 2 of 1956, Ark. Stat. § 80-1519 et seq.—referred to in the trial court's opinion as the Pupil Enrollment Act of 1956.

2. Legislative Act No. 461 of 1959—referred to in the trial court's opinion as the Pupil Assignment Act of 1959.

3. The trial court gave recognition, as against the 1956 Act, to the provision in the 1959 Act that "All laws or parts of laws in conflict herewith are hereby repealed," but further held that, in any event, there was no difference of controlling substance between them in relation to the facial constitutionality of each of them.

and reversing the court's holding on the appeal of the defendants.

An order was conformingly entered by us affirming the court's holding that the Acts of 1956 and 1959 were not unconstitutional on their face; reversing the court's holding to the effect that, notwithstanding this fact, the defendants were not entitled in the circumstances of the situation to have the use or benefit of the 1959 Act in determining to what school the plaintiffs had a right to be assigned for the current school year, and that plaintiffs could not be required to exhaust the administrative procedures and remedies provided by such Acts in relation to such assignment as the Superintendent of Schools might assume to make of them; and vacating the mandatory injunction which the court had issued directing the defendants to make admission of the plaintiffs to the school they sought to attend, without regard to the provisions and procedures of said Acts.

[Proceedings to Remain Open]

We made inquiry from the bench whether, and were given assurance by counsel for the defendants that, under the statute and the implementing regulations of the Board, there would be available an opportunity to the plaintiffs to make application for assignment to the school to which they sought to be admitted and have that application determined, in relation to the 1959-1960 school year. In this connection, we included a provision in our order that the proceeding would on remand of the cause be allowed to remain open on the records of the District Court, to permit of the filing of such supplemental complaint, if any, as might be entitled to be presented, in case of any unconstitutional application of the 1959 Act against the plaintiffs or of any other unconstitutional action on the part of the District against them.

To safeguard further against the possibility of delay in respect to the opening of the school year, we ordered that our mandate should be forthwith issued, with a reservation, however, of the right on our part to subsequently file this opinion, in fuller expression of our action and order. Since, however, it was clear that the District had not up to that time adopted any formal plan or taken any other steps publicly to disestablish segregation in the school system, we deemed it appropriate to require, and made our order provide that the defendants should be

enjoined, and an injunction was directed to be issued to prevent them, from continuing to maintain the system of unconstitutional segregation, which had previously existed in the District.

In respect to our affirmance of the trial court's holding that the 1956 and 1959 Acts were not unconstitutional on their face, we deem it sufficient to make only a brief expression.

[Arkansas, Alabama Acts Identical]

The Arkansas Pupil Placement Act of 1959 is identical with (except for a difference in one word), and apparently was copied from, the Alabama School Placement Law, which had precedingly been held, by a three-judge district court in *Shuttlesworth v. Birmingham Board of Education*, D.C.N.D.Ala.1958, 162 F.Supp. 372, not to be capable of being branded as unconstitutional on its face.

The Negro plaintiffs in that case were denied the admittance relief which they sought, as here, without having resorted to the administrative procedures of the Placement Law, on the grounds, as stated in the court's opinion, that it was "possible for the Act to be applied so as to admit qualified Negro pupils to nonsegregated schools", and that the court could not say, "in advance of its application, that the (Placement) Law would not be properly and constitutionally administered". At pages 381 and 382, of 162 F.Supp.

The court summarized its holding in a concluding paragraph, as follows: "All that has been said in this present opinion must be limited to the constitutionality of the law *upon its face*. The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application." At page 384, of 162 F.Supp.

An appeal was taken by the plaintiffs to the Supreme Court, where the judgment was affirmed "upon the limited grounds on which the District Court rested its decision." 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145.

We shall not here detail the provisions of the Arkansas Pupil Placement Act of 1959, which has been set out in full in Footnote 4 of the trial

court's published opinion, D.C., 176 F.Supp. 242. The factors which the Act authorizes to be taken into account in the assignment or placement of pupils among the public schools of the state as existing in the individual school districts thereof—and indeed which the Act says “shall be considered, with respect to the individual pupil” (emphasis supplied)—may be found also in the *Shuttlesworth* opinion, 162 F.Supp. at page 382, where the similar standards of the Alabama Placement Law are quoted.

Attention may, however, in passing, be called to the protective provisions of Section 9 of the Act, permitting “an exception before such Board to the final action of the Board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States” [176 F.Supp. 246]; authorizing the Board to give reconsideration to its action on this basis; and (beyond the right which exists in general to obtain judicial vindication of a personal constitutional violation) creating also a special remedy of judicial review on this ground for any such denial of a constitutional right by a Board, with provision for a trial de novo of the facts of the particular situation for purposes of that question.

[*Act Constitutional on Face*]

Thus, so far as the face of the statute is concerned, there is no basis to say, in legal construction, that the Act is designed, or that it can only operate, to maintain segregation and to prevent integration in a school system.⁴ On the other hand, as emphasized in the *Shuttlesworth* case, 162 F.Supp. at page 384, the statute cannot, because of its facial constitutionality, be made to serve through artificial application, as an instrument for maintaining or effecting a system of racial segregation. It cannot be given an application designed to escape or by-pass the *Brown* cases. Recognition of and obedience to the holdings of the *Brown* cases must implicitly exist in its operation and application.

Accordingly, any scrutiny which the federal courts may be called upon to make of what has been done under such a statute, where a charge of racial discrimination is involved, must neces-

sarily be within the focus and tests of its lack of disharmony with the objective, the obligation and the responsibility dictated by the *Brown* cases. Insofar as the question of desegregation is concerned, a placement or assignment statute, such as the Arkansas Act, is entitled to have play, on the basis of state sovereignty, as a means or an aid for effecting a sound and orderly distribution of pupils, in relation to all the problems of a public school system, except those of purely racial consideration. Differences in the practical problems of eliminating racial segregation under the varying situations of states or local districts must look for their margins of latitude in effecting that result to the principles laid down in *Brown v. Board of Education*, 349 U.S. 294, 299-300, 75 S.Ct. 753, 756, 99 L.Ed. 1083.

[*Recognition Due Assignment Statute*]

In this field of constitutional paramountcy, a placement or assignment statute is entitled to be accorded recognition only as an implement or adjunctive element on the part of a state for effecting an orderly solution to its desegregation difficulties, in proper relationship to its other school-system problems, but with a subservience to the supreme-law declaration of the *Brown* cases as to all imposed segregation and the obligation owed to get rid thereof within the tolerance entitled to be allowed play under these decisions for accomplishing that result.

But there is no need here to extend further these generalized observations. Reverting to the facial constitutionality of the Placement Act, it follows that the plaintiffs are without any general public-school right under Arkansas law to seek admission to a particular school, except on the basis of and in accordance with the provisions of that Act. While their federal constitutional rights have been previously violated in that they have been required to attend a school segregated under administrative authority, the Placement Act provides a means for them now to seek admission to the school which they think they are otherwise entitled to attend and, insofar as the provisions of the Act are concerned, have their right to do so determined without regard to their race or color.

Section 4 of the Act permits a Board of Education to delegate to the Superintendent of Schools the general task of making assignment of pupils among the schools of a District. But Section 7 makes provision for a right on the

4. No separate consideration is necessary of the superseded Arkansas Pupil Assignment Law of 1956, as related to its operativeness at the time the plaintiffs instituted this suit, because of its similarity in substance to the 1959 Act and its equal constitutionality facially.

part of a parent or guardian of a pupil to file objections in writing to an assignment so made, to make request for a transfer of the pupil to a designated school, and to demand a hearing. The Board is required in such a situation to hold a hearing within a fixed time and to allow the presentation of evidence. "It shall be the duty of each local Board to hear and consider all witnesses appearing before the said Board and having information pertinent and relative to the matter and to consider all relevant documentary evidence." "No final order shall be entered in such case until each member of the board of education has personally considered the entire records." [176 F.Supp. 246]

The Board must make findings of fact as a basis for its decision, "and such findings and action shall be made a part of the records of the local Board." Also, as has been mentioned above, there is a provision for having any claim of unconstitutionality in its action called to the Board's attention, through allowing to be filed "an exception before such Board to the final action of the Board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States * * *".

[Administrative Provisions Ignored]

The plaintiffs here have given no recognition to these administrative provisions and requirements, as they existed under either the 1956 or the 1959 Act. All that they did in respect thereto was to make oral request, through their parents, of the Superintendent of Schools, to be permitted to enroll in the school to which they sought admittance. The Superintendent refused this request and told them that they would have to enroll in the school (all-Negro) which they had previously attended. The parents filed no written request with the Board for assignment or transfer and for a hearing, and there has never been any Board action under the statute with respect to the situation.

The plaintiffs have contended for purposes of this suit, both in the trial court and here, that they were not required to resort to the procedure of the Act for having the School Board pass upon the question of their right to be transferred and to be enrolled in the school to which they sought admittance, because to do so would have been futile in the situation, and that they thus were entitled to be regarded as having constructively exhausted their administrative remedies under the Act.

[Trial Court's View]

The trial court adopted this view, in decreeing immediate admittance of the plaintiffs without regard to the administrative prescriptions, procedures and remedies of the Acts. It held that the defendants had "carried into effect, enforced and maintained, a rigid, racial segregation policy in all of its schools, which, without exception, permitted no entry of any colored child into its white schools"; that "the Board intends a continuation of that policy, without change or modifications and * * * its professing of the Pupil Enrollment Act of 1956 having been applied and in operation during the years 1957, 1958 and 1959, is but a cover-up to conceal its anti-racial and pro-racial segregation attitude"; that the plaintiffs had applied for admission to the school involved on three separate occasions and each time had had their requests refused, and "Another one, on the petition for hearing before the Board, would indeed have been futile and therefore not required as a requisite to the commencement of this suit"; and that the plaintiffs therefore were entitled to be legally regarded as having "exhausted their administrative remedies, actually, under the Act".

It is true that the several schools of the District had been continued to be operated with racial enrollments only. The defendants asserted that this situation had obtained because request in accordance with the statute had never been made to the Board, under the provisions of either the 1956 or the 1959 Act, for reassignment or transfer to another school by anyone. Their position, both in the trial court and here, is summarized by their counsel as follows: "They (the Board) have continued to operate the schools just as they did before 1954, with one vital exception. They are now bound by law, and sincerely recognized that they are so bound, to make assignments without discrimination because of race."

[Lack of Desegregation Plan]

The lack of any affirmative plan or action to disestablish the segregation status which had unconstitutionally been set up in the District, other than as the Board might be called upon to deal under the provisions of the 1956 or the 1959 Act with some individual application for assignment to another school, would perhaps not measure up to the legal and moral responsibility resting on a Board under the expression

and holding of the Brown cases. But we do not think that it is judicially wise or necessary to impatiently declare that desegregation should on this account be sought to be achieved, without regard to the overall pattern which the District is entitled to create through a constitutional application of the Placement Act, by assuming to excuse some individual student from the requirements of the assignment or placement statute. It must be recognized that the plaintiffs have not been without opportunity, since 1956, to request assignment or transfer on the basis of legislative non-racial scheme, and to have any unconstitutional application of that legislative scheme attempted to be made against them righted by the federal courts.

If there could be any right on the part of the courts to disregard the placement or assignment statute before use and application of it, it would only be on the basis that it was legally certain that it was going to be used as a subterfuge for effecting an unconstitutional result. The difficulty with the waiver made by the trial court of the procedures of the statute here is that we do not believe that it is legally capable of being said in the situation that a resort by the plaintiffs to the statute would have resulted in an unconstitutional application of it against them and so would have been a useless and futile act.

It might perhaps be capable of being inferred, from what they have failed to do in the District on their own responsibility, that the members of the Board are all segregationists in their convictions—although only one of them was called upon to testify at the trial. This was the President of the Board, who frankly admitted that the District had no plans for "a wholesale integration", but who further stated that any applications made to the Board by individual Negro students for admission to the school involved under the provisions of the placement statute would, so far as he was concerned, receive "consideration without race", and that he would vote to admit any such student, without regard to race, if he was persuaded by the evidence on a hearing that the student possessed the requisite qualifications under the statute. "I'm a law-abiding citizen, and under the law I would vote 'yes'."

[Legal Uncertainty]

But the lack of right to say as a matter of legal certainty what the result of an application by the plaintiffs to the Board for a trans-

fer and for a hearing thereon would be does not stem from this testimony of the President of the Board and a crediting of it. It turns upon the legal aspect that what the statute provides for and requires the Board to engage in as to such an application, where rights are claimed to be involved, is a quasi-judicial hearing and decision. Whatever might be the personal views of the members of the Board upon the segregation question, this does not afford a basis recognized in law for allowing conclusion and forecast to be made of their decision, where the matter is entrusted to them in a quasi-judicial capacity and responsibility.

The statute makes of the Board the equivalent of an administrative tribunal, with the power and duty of engaging in adjudicatory function, including the consideration of the possibility of constitutional violation in relation to its result. No more than in the case of any other administrative agency, or of a court, does it seem to us that there can properly be recognized an anticipatory right to brand such a proceeding before the Board, in its official responsibility for administration of the statute, as being legally futile and so unnecessary. Even the important problem of school desegregation cannot soundly permit of such a departure from established legal concept and fundamental principle.

[Carson Reasoning Adopted]

It is for this reason that we think there is controlling here, and that we adopt, what was said in *Carson v. Board of Education*, 4 Cir., 227 F.2d 789, 790: "Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary".

In a subsequent case, *Carson v. Warlick*, 4 Cir., 238 F.2d 724, certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664, the court, in an opinion by the late Chief Judge John J. Parker, made reiteration of this judicial limitation, holding that the plaintiffs there were not entitled to seek judicial relief, "for the reason that it nowhere appears that they have exhausted their administrative remedies under the North Carolina Pupil Enrollment Act, and are not entitled to the relief which they seek in the court below until these administrative remedies

have been exhausted". At page 727 of 238 F.2d. See also *Holt v. Raleigh City Board of Education*, 4 Cir., 265 F.2d 95, 98.

In concluding, we shall make reference once more to the provision of our order directing that the defendants be enjoined from continuing to maintain the system of unconstitutional segregation, which has previously existed in the District, and which the defendants have heretofore taken no steps to disestablish; and to the provision, which we have discretionarily included, allowing the proceeding to remain open on the records of the District Court, to permit of the filing of such supplemental complaint,

if any, as might be entitled to be presented, in case of any unconstitutional application of the 1959 Act against the plaintiffs or of any other unconstitutional action on the part of the District against them.

It was on the basis of the considerations which have been set out herein that we made affirmance, as has been indicated, of Case No. 16,327, the appeal taken by the plaintiffs, and that we made reversal and remand of Case No. 16,323, the appeal taken by the defendants, subject to the directions referred to in the preceding paragraph hereof.

EDUCATION

Public Schools—Georgia

Vivian CALHOUN et al. v. MEMBERS OF THE BOARD OF EDUCATION, CITY OF ATLANTA, et al.

United States District Court, Northern District, Georgia, Atlanta Division, January 20, 1960.

SUMMARY: Several Atlanta, Georgia, Negro children sought in federal district court to have Atlanta school officials enjoined from operating segregated schools. A motion by defendants to dismiss was denied. On June 5, 1959, in a preliminary order prior to trial, the court took judicial notice of segregated operation of Atlanta public schools, stating that such operation violates the Fourteenth Amendment but that this tentative ruling did not mean that immediate integration would be ordered. Defendants objected to the assumption that they had pursued a policy of racial discrimination and contended that separation of the races in the Atlanta schools arose through the choice of Negroes themselves. Subsequent to the trial, the court on June 16, 1959, entered its findings of fact and conclusions of law that racial segregation did exist in the operation of Atlanta public schools contrary to the Fourteenth Amendment as interpreted in the *School Segregation Cases*. Defendants were enjoined from further discriminatory practices, and ordered to submit, by December 1, a complete plan for a prompt and reasonable start toward desegregation and a systematic, effective method for achieving desegregation with all deliberate speed. It was noted that under Georgia law, integration would result in state money for Atlanta schools being cut off, with the possible effect of closing them. Therefore, the court stated that the plan required might be submitted to it subject to approval by the Georgia Legislature and, if the plan were approved by the court as reasonable, the legislature would be allowed time to act upon it. —F.Supp.—, 4 Race Rel. L. Rep. 576. The board submitted its plan on December 1, 1959, plaintiffs filed objections, and a hearing was held on December 14. The plan provided that all pupils in schools shall, until and unless transferred to some other school, remain where they are, and that all new and beginning students shall be assigned by the superintendent to a school selected in accordance with specified standards which included the possibility of friction or disorder at the assigned school, the psychological effect on the pupil of attendance at a specified school, the pupil's home environment, and the morals of the student. The court held that the possibility of friction and disorder could not be considered a valid criteria, but that there was no indication that the psychological factors could not be constitutionally applied. The court ordered the plan amended to provide more expeditious handling of assignment requests, to eliminate the racial factor in determining the possibility of friction at an assigned school, and to spell out the absence of racial criteria in applying the psychological tests for assignment. The plan as amended was accepted by the court on January 20, 1960, and subsequently a delay of the effective date of the plan until May 9, 1960, was granted to allow time for legislative action.

Reproduced below are the plan submitted December 1, 1959, the court's opinion of December 30, 1959, the amended plan of January 19, 1960, the court's order of January 20 accepting the amended plan, and the order of March 9 permitting a delay.

School Board Plan of December 1, 1959

WHEREAS, The Atlanta Board of Education has been directed to present to the Court by Dec. 1, 1959, a plan designed to bring about compliance with the order of the Court of July 9, 1959; and

WHEREAS, The Atlanta Board of Education is making every effort to provide the Atlanta Public School System with the very best buildings, equipment, and other facilities and curricula for approximately 116,000 students; and

WHEREAS, the City of Atlanta is undergoing rapid urbanization, bringing an influx of children of varying degrees of achievement and ability due not only to individual aptitude but to educational opportunities heretofore available; and

WHEREAS, There is and has been public construction in Atlanta, which together with other building has resulted in drastic changes in neighborhood patterns, and these changes will be greatly magnified by the proposed slum clearance program involving the vacating of more than 1,200 acres of land with the resultant displacement of families; and

WHEREAS, These factors result in not only a continuous influx of new students into the system, but in the continuous movement of students within the system, and also from the system into the suburban areas adjoining Atlanta; and

WHEREAS, the changing neighborhood patterns, the 39 million dollars worth of new school construction since 1948, the great influx of new students, and the continuous movement of students within the system has caused admission, assignment, transfer, and continuance of students in and to the various schools within the system to become a major problem of the administration; and

WHEREAS, Pending further studies and recommendations by the school authorities, the Board of Education considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with requests on behalf of pupils would be disruptive to orderly administration, and would tend to invite or induce

disorganization and would impose an excessive burden on the available resources as well as the teaching and administrative personnel of the schools; and

WHEREAS, In September, 1960, there will be a shortage of 580 classrooms in Atlanta schools and many children are now on double sessions, housed in churches and facilities other than classrooms, and the Board realizes that continuous system-wide studies must be made to determine available seats for students and studies of achievement and ability of the students where these seats may exist as well as other factors consistent with the educational policies governing the admission, assignment, transfer, and placement of pupils in the public schools as will be prescribed in this document; and

WHEREAS, the State Board of Education has not promulgated rules and regulations relative to the placement of students in the schools, and this Board has the inherent power of pupil placement, and more complete regulations are necessary,

NOW THEREFORE: To insure orderly procedures of uniform application for pupil assignment, transfer and-or placement, and to enable the continuing improvement of the educational advantages offered, the following rules and procedure shall be followed:

1. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effects or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the possibility of threat of friction or disorder among

pupils or others; the possibility of breaches of the peace or ill will, or economic retaliation within the community; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the ability to accept or conform to new and different educational environment; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

2. Subject to supervision and review by the Board, the City Superintendent of Schools shall have authority and be charged with responsibility with respect to the assignment (including original and all other admissions to the school system), transfer and continuance of pupils among and within all public schools operated under the jurisdiction of the Atlanta Board of Education.

3. The superintendent shall have authority to determine the particular public school to be attended by each child applying for assignment or transfer, and no child shall be entitled to be enrolled or entered in a public school until he has been assigned thereto by the superintendent or his duly authorized representative. All existing school assignments shall continue without change until or unless transfers are directed or approved by the superintendent or his duly authorized representative.

4. Between June 1 and June 15 applications for the admission, assignment or transfer, and/or placement of pupils to or in particular schools shall be directed to the superintendent of schools and shall be delivered to the school principal unless otherwise directed by the superintendent on forms provided by the superintendent, and made available at the offices of the Board of Education. Such forms shall be delivered only on request of and to the applicant student or to his parent or legal guardian, in person, by the principal of the school then attended by such student or by the superintendent of schools.

5. A separate application must be filed for each pupil desiring assignment or transfer to a

particular school and no joint application will be considered.

6. Applications for assignment or transfer of pupils must be filled in completely and legibly in ink or typewriter and must be signed by both parents or the parent to whom the child has been awarded by court proceedings, or the legal guardian of each child for whom application is made. Further, the application must be notarized at the time it is filed. Notice of the action taken on each application shall be mailed to the parents or guardian, at the address shown on the application, which shall be final, unless a hearing before the board is requested in writing 15 days from the date of mailing such statement.

7. The superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests and other investigations as he deems appropriate. In the absence of excuse, satisfactory to the superintendent or the board, failure to appear for any requested examination, test or interview by the child or the parents or guardian will be deemed a withdrawal of the application.

8. A parent or guardian of a pupil may file in writing with the Atlanta Board of Education objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, or unless the Board deems a hearing necessary, the Board shall act upon the same within a reasonable time stating its conclusion. If a hearing is requested or if the Board deems a hearing necessary with respect to the Superintendent's conclusion on an application, the parents or guardian will be given at least five days' written notice of the time and place of the hearing. The hearing will be begun within thirty days from the receipt by the Board of the request. Failure of the parents or guardian to appear at the hearing will be deemed a withdrawal of the application.

9. The Board may conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be deemed a final decision by the Board. The Board of Education may designate one or more of its members or one or more competent examiners to conduct any

such hearing, take testimony, and report the evidence, with his recommendation, to the entire Board for its determination. In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations and examinations. No final order shall be entered in such case until each member of the Board of Education has considered the entire record.

10. Unless postponement is requested by the parents or guardian, the Board will notify them of its decision within twenty days after the conclusion of the hearing. Exceptions to the decision of the Board may be filed, within five days of notice of the Board's decision, and the Board shall meet within fifteen days of the receipt of the exceptions to consider the same. Any person dissatisfied with the final decision of the Board may appeal to the State Board of Education as provided by law.

11. If, from an examination of the record made upon objections filed to the assignment of any pupil to a particular school, or upon an application on behalf of any pupil for assignment to a designated school, or another school to be designated by the Board, or from an examination of such pupil by the board or its authorized representative, or otherwise, the Board shall determine that any such pupil is between his or her seventh and sixteenth birthdays and is mentally or physically incapacitated

to perform school duties, or that any such pupil is more than sixteen years of age and is maladjusted or mentally or otherwise retarded so as to be incapable of being benefited by further education to the extent that further use of public funds for the education of such pupil is not justified, the Board may assign the pupil to some available vocational or other special school, or terminate the public school enrollment of such pupil altogether.

12. Beginning Sept. 1, 1960, or on Sept. 1, following favorable action by the General Assembly of Georgia, student assignment in the Atlanta Public School System shall be made in accordance with aforesaid rules and regulations and without regard to race or color. For the first school year in which it is effective, the plan shall apply to the students in the 12th grade. Thereafter, in each successive year, the plan shall be extended to the immediate lower grade; e.g., in 1961-62—grade 11, in 1962-63—grade 10, etc., until all grades are included.

13. Nothing contained in this resolution shall be construed to prevent the separation of boys and girls in any school or grade, and to prevent the assignment of boys and girls to separate schools; and

14. These rules and procedure shall be contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation, and shall be submitted to the General Assembly for approval. Counsel are directed to transmit copies to the President of the Senate and the Speaker of the House of Representatives upon authorization by the Court.

Court's Opinion of December 30, 1959

Pursuant to order of this court dated January 6, 1959, defendants, as members of the Atlanta Board of Education, have submitted to the court a plan under which they propose to operate the Atlanta public schools without any discrimination as to race or color. The court issued a rule nisi, plaintiffs filed their objections to the plan, and the matter came on for hearing on Dec. 14, 1959.

Defendants promptly complied with the order of court in preparing and submitting their plan, but cite no authorities in support of the same. Plaintiffs' counsel have cited to the court a few decisions which bear upon the question. As the

plan must be passed upon by the court prior to convening of the Georgia Legislature and court calendars are already set up covering the intervening period, it has been necessary for the court over the Christmas holidays to give as much study to the matter as possible.

The court has been greatly assisted in this matter by an article by Professor Daniel J. Meador, assistant professor of law at the University of Virginia, appearing in the Virginia Law Review of May, 1959, beginning at page 517, which reviews many cases and statutes bearing upon the questions here involved and many of the cases cited below were obtained by

the court from that article. Should the court find it necessary this opinion will be supplemented or revised at a later date.

[Facts Recited]

As introductory to the plan itself the resolution adopting the same states certain pertinent facts confronting the Atlanta Board of Education, and these facts not being refuted by the plaintiffs are taken to be true. Among other things a recital is made that the board is faced with the task of educating 116,000 pupils, of which approximately 40 per cent, or some 46,400, are Negroes; that there is at this time a rapid influx of children of school age into the city, that these children vary in achievement and ability; that there is at present a shortage of some 580 classrooms, many classes are held in churches and other buildings, and many have double sessions. Other problems confront the board brought about by slum clearances and changes in residential patterns in various communities.

The foregoing facts are stated by the court to illustrate the problems confronting the defendant Board of Education. The plan abolishes segregation beginning at the twelfth grade, and each year takes in a lower grade until all grades in all schools are included, and should all or a large part of 46,400 Negro children apply for assignment at one time, it would of course put an intolerable burden upon the school board to process their applications and make readjustments in all classes and in all schools. That fact must have been in the mind of the defendants when they proposed commencing the plan with only the twelfth grade.

[Degree of Disruption]

Also, it is recognized that where such a plan begins with the first grade and extends to the higher grades there is a greater problem as to adequate housing, and a greater degree of disruption in initiating the plan.

Essentially the plan contemplates that all pupils in the schools shall until and unless transferred to some other school, remain where they are, all new and beginning students being assigned by the superintendent or his authority, to a school selected by observance of certain standards as set forth in the proposed plan.

Included in the objections to the plan offered as a whole are these:

That the plan is not complete, that it "avoids

the duty imposed on defendants to desegregate," that "the inherent delays embodied in the plan make a prompt and reasonable start impossible; that defendants do not show that additional time is necessary, that two of the factors for transfer of placement are constitutionally irrelevant and that the criteria upon which the plan proceeds is too vague and indefinite. It is also attacked upon the ground that it is made contingent upon passage of statutes by the Georgia General Assembly.

As many of these objections are similar they will be discussed under the several headings set forth below:

(1) The objection to the plan that it allegedly "avoids the duty imposed on defendants to desegregate," is an objection heretofore frequently considered by the courts and uniformly rejected.

The real essence of this objection stems from the fact that in urban areas the public schools are frequently located in the midst of large residential areas either Negro or white, and, when pupils are assigned to the school nearest to their homes and therefore reached by them more safely and easily, the result is that the school will naturally, without any racial discrimination, be composed practically without exception of only white or Negro pupils.

[Reasons for Segregation]

The above result, however, where it pertains, is not necessarily brought about on account of racial discrimination, but on account of geography and residential patterns.

In the case of *Borders vs. Rippy*, 247 F.2d 268, at p. 271, the Fifth Circuit Court of Appeals speaking through Judge Rives (now chief judge of that circuit) wrote as follows:

"The equal protection and due process clauses of the 14th amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. *Avery vs. Wichita Falls Independent School District*, 5 Cir., 1957, 241 F.2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color."

The case just cited was subsequently cited

with approval by the same court, in *Holland vs. Board of Public Instruction*, 258 F.2d 730. It is the law in this Circuit and is binding upon this Court.

The same principle of law has been followed in other cases.

In *Avery vs. Wichita Falls Independent School District*, 241 F.2d 230, the court cited with authority the opinion of a district court which held, with reference to the case of *Brown vs. Board of Education*, 347 U.S., 483, that the Supreme Court

"... has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attended. What it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains . . . if the schools which it (the state) maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration, it merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action."

In a subsequent case, *Rippy vs. Borders*, 250 F.2d 690, the Court again announced its adherence to the foregoing principles.

[Virginia Case]

In the Fourth Circuit in the case of *Thompson vs. County School Board of Arlington County*, 144 F.S. 239, Judge Bryan wrote as follows:

"It must be remembered that the decisions of the Supreme Court of the United States in *Brown vs. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed., 1083, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of that court is simply that no child shall be denied admission to a school on the basis of race or color. . . . Consequently, com-

pliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate."

The above decision was affirmed by the Court of Appeals of the Fourth Circuit and certiorari to the United States Supreme Court was denied. See *The School Board of Charlottesville, Virginia, et al vs. Doris Marie Allen, et al*, 240 F.2d p.59.

The Plan of the Atlanta School Board therefore, is not invalid merely because it prohibits racial discrimination rather than requiring a mixing of races.

(2) Objection is made to the proposed Plan on the ground of "the inherent delays embodied in the Plan."

Plaintiffs' counsel insisted that the Plan in question does not meet the requirements laid down by the Supreme Court. They cite the case of *Cooper vs. Aaron* 358 U.S., p.1, where at p.7, the Supreme Court pointed out that:

"delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance."

There is no complaint that the processes of the court have not moved with suitable speed. As a matter of fact, the order requiring a plan to be submitted was entered within less than two years from the date of the filing of the suit. The charge of delay is based upon the contention that a period of 12 years is required for the completion of the elimination of desegregation in all of the classes in all of the schools.

[Time Element]

Counsel for plaintiffs do not cite any cases holding that, where a prompt start is made, it can be said not to be diligently and earnestly pursued because it requires a total period of 12 years. Suffice it to say that since rendition of the *Brown* decision a number of school boards have established plans, some beginning at the first grade and extending through the higher grades, others beginning at the higher grades and extending through the first grades, and as far as this court knows, none of such plans have been rejected upon the basis that they do not move with sufficient speed. A number of these

plans are contained in cases which are herein-after cited.

(3) A general review of the measures taken in many Southern states and border states since the rendition of the Brown decision, both by way of legislative enactments and by way of plans adopted without legislative action, show that the so-called pupil placement plan (also referred to as pupil assignment plans, enrollment plans, etc.) have been adopted in one form or another in many states including Virginia,¹ North Carolina, Alabama, Louisiana, South Carolina, Florida and Tennessee. In some of these states the plans were adopted soon after the Brown decision, although there was at the time of the adoption of the same no litigation pending nor any action being taken toward the elimination of racial discrimination. The plans were no doubt adopted against the day when such efforts would be made and they were adopted in full recognition of the fact that the people of the states adopting them had no desire to abolish segregation, but considered it wise to make plans for the future against the day when segregation in such states might be enjoined by the courts. Mississippi was one of the first states to adopt such legislation, though as yet there have been no efforts to abolish segregation in that state.

It appears also the pupil placement plans have been of force in various parts of the country for many years before the matter of racial discrimination became an issue.

It is now well established that school authorities have the inherent power to exercise their own discretion as to the assignment of pupils to various schools within their respective systems so long as their discretion is exercised in good faith and discrimination does not exist.

It therefore appears clearly that the plan submitted by defendants is within the power of the defendant school board to establish the same unless subject to one or more of the defects charged against it.

(4) Plaintiffs insist that "two of the factors which the plan refuse consideration of are constitutionally irrelevant and may not be applied in this case," these factors being the following:

1. The legislative history of Virginia's first Pupil Placement Law which was held invalid is contained in *Adkins vs. School Board*, 148 F.S., 430, decided January 11, 1957. Subsequent legislation in Virginia upon this question and various local plans therein established based upon the inherent power of the school authorities, are not discussed in this Opinion.

- (1) The possibility of threat of friction or disorder among pupils or others, and
- (2) The possibility of breaches of the peace or ill will, or economic retaliation within the community.

In the case of *Cooper vs. Aaron*, 358 U.S., p. 1, the school board in Little Rock sought a postponement of their program for desegregation "because of extreme public hostility." The trial judge found as a fact that there were "repeated incidents of more or less serious violence directed against Negro students and their property" (see p. 13). The Supreme Court held that the foregoing facts did not justify a postponement of the plan of desegregation, stating that however desirable the preservation of the public peace may be "it cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." (See p. 16).

It therefore follows that the two considerations quoted above cannot validly be considered by the Board of Education where such factors pertain only to race or color. Whether these factors might be material under facts not involving race or color need not now be determined. That is to say, whether or not the personal traits of a pupil, regardless of race or color, might create a possibility of threat of friction or breach of peace is another question.

(5) Plaintiffs' counsel contend that the following standards are too vague and indefinite, to-wit:

- (1) The psychological qualification of the pupil for the type of teaching and associations involved (Paragraph I).
- (2) The psychological effect upon the pupil of attendance at a particular school (Id.).
- (3) The home environment of the pupil (Id.).
- (4) The maintenance or severance of established social and psychological relationships with other pupils and with teachers (Id.).
- (5) The ability to accept or conform to new and different educational environment (Id.).
- (6) The morals, conduct, health and personal standards of the pupil (Id.).

It is true that "psychological and qualifications" and "psychological effect" are broad and general terms. Psychology covers a vast field. "Psychological test" has been defined as "any

method used for measuring an individual's mental characteristics, as memory, intelligence, emotionality, intelligence or speed of reaction." See Webster's New International Dictionary, 2nd Ed. Certainly the foregoing factors would be relevant and material in pupil placement and there is no reason why they should be applied in a discriminatory way. The fact that the language is general does not mean that it cannot be made to encompass a test which would be valid.

Should the defendant Superintendent of Schools interpret such factors in a way that would be discriminatory the pupil involved would have the right of review. A finding against a pupil based upon psychological tests should be sufficiently definite so that the ruling upon review could be understood.

Indeed the Supreme Court in deciding the case of *Brown, et al vs. Board of Education of Topeka*, 347 U.S., 483, based its decision in part upon the psychological effect which certain practices may have upon the students involved.

[Question of Good Faith]

(6) Plaintiffs also contend in their brief that the Plan in question is not proposed in good faith and will be violated. This same contention was urged in the case of *Shuttlesworth vs. Birmingham Board of Education*, 162 F.S., 372, but was rejected by a three-judge court whose judgment was affirmed, 358 U.S., 101. The trial court after stating that they could not in testing the constitutionality undertake a search for motive stated the following:

"If, however, we could assume that the Act was passed by the Legislature with an evil and unconstitutional intent, even that would not suffice. As executive officers of the State, the members of the defendant Board are likewise required to 'be bound by oath or affirmation to support this Constitution.' No court without evidence can possibly presume that members of the defendant Board of Education will violate their oaths of office."

The objection is not well taken.

(7) Plaintiffs object to the administrative procedure set forth in the Plan whereby a pupil might have a review of the rejection of his application for placement or transfer. In plaintiff's brief it is stated:

"The plan fails to set a period of time within which the Superintendent of the Board must

act upon an application for assignment or transfer."

This objection is well taken. Following is an outline of the Plan insofar as it regards administrative appeal:

Under the schedule contained in the Plan for the administrative consideration of these applications, it would be difficult if not impossible, for an application filed on June 15th to be completely processed by September 1st for this reason: Upon filing of application for transfer on or before June 15th, the Board is required to "act upon the same within a reasonable time" (Paragraph 8 of the Plan). If a hearing is requested by the applicant or held by the Board, five days notice shall be given to the parents or guardian and "the hearing will be begun within thirty days from the receipt by the Board of the request" (Paragraph 8 of the Plan). A hearing may be conducted by the Board itself, in which event it could probably make a prompt decision. However, it is provided said hearing may be had before not less than three of its members, or before competent examiners, which shall report to the Board and "no final order shall be entered in said case until each member of the Board of Education has considered the entire record." The Board will notify applicant of its position "within twenty days after the conclusion of the hearing." Exceptions to the decision made by the Board may be filed within five days of notice of the Board's decision, and the Board shall meet within fifteen days of the receipt of the exceptions to consider the same.

The foregoing would consume a period of time in excess of seventy-five days, and only seventy-five days elapse between June 15th and September 1st. Furthermore, endless delay could be caused by the provision that no final order would be entered before each member of the Board of Education should consider the entire record, nor does it appear certain that some member will not be hindered in some way from considering the entire record.

The Plan further provides that "any person dissatisfied with the final decision of the Board may appeal to the State Board of Education as provided by law." To that end there was introduced in evidence (Plaintiffs' Exhibit No. 1) a booklet entitled "Georgia School Laws," Part XXXVI, pertaining to procedure in cases on appeal to the State Board of Education. However, that portion of the school laws pertains to appeal in "all controversies heard by a county

board of education" and this case involves a city board of education.

[Various Aspects Open]

As the defendant school board has merely submitted its plan because the Court ordered it to do so, and is making no effort to sell the Plan to the Court, various aspects of the matter are left open. The Plan, however, will have to be changed insofar as the procedure in regard to applications for transfer are concerned, so as to insure a hearing upon such applications promptly following June 15th of each year, and a final administrative decision on the same on or before September 1st of each year. Explanation should also be made in connection therewith as to what is meant by "appeal to the State Board of Education," particularly since the latter party is not a party to this case and cannot be compelled by this Court to make a ruling upon such appeal.

Counsel for defendants stated at the hearing that defendants would be willing to amend this plan, and defendants are therefore directed to file an amendment to the same with this court in the regards above specified on or before Jan. 6, 1960, serving opposing counsel with a copy of the amendment immediately upon its completion, and plaintiffs may file written objections thereto within five days thereafter, and the court will then make a ruling upon any objections then pending.

There are several decisions which go into the matter of validity of standards which school authorities may adopt as to Pupil Placement and Assignment, same being discussed in *Shuttlesworth vs. Birmingham Board of Education*, 162 F.S., p. 372. There a three-judge court upheld the Alabama statute and its decision was affirmed by the United States Supreme Court (358 U.S., 101).

The trial court pointed out that Pupil Placement Laws had been enacted in 10 states (see p. 379, h.n.6). Attention was called to the fact that statutes in Louisiana and Virginia had been held void, pointing out also that the Alabama law was more similar to a statute of North Carolina which had been held valid in *Carson vs. Warlick*, 238 F.2d. 724, cert. denied 353 U.S., 910. This court assumes that all of the standards set forth in the proposed plan not herein attacked are conceded to be valid.

Able counsel for plaintiffs places great empha-

sis on the case of *Gibson vs. Board of Public Instruction of Dade County, Florida*, et al.,—F.2d, p— (Nov. 24, 1959) by the Fifth Circuit Court of Appeals. This court interprets that case as holding that the Pupil Assignment Law involved therein did not meet the requirements of law primarily for the reason that after its adoption,

"no notice or advice from the Board or Superintendent was given to the children and their parents . . . to the effect that Negro children . . . were not permitted to have considered fairly their choice of a school"

and upon the further ground that after adoption of the plan the school authorities continued to designate the schools separately according to races. The case does not seem to be controlling upon the case at Bar.

[Contingency of Plan]

(8) It is contended "the plan can not be made contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into operation." As to the above objection at the time of the hearing on December 14th the Court sought to make full explanation concerning the provisions in the order of this court entered July 9, 1959 that defendants might submit a plan contingent upon its approval by the Georgia Legislature.

At the risk of repetition the court now states that the existence of certain Georgia statutes would mean that the mixing of races in any school of the Atlanta School System would mean that all financial aid to the same from the state would be cut off, and apparently without the aid of funds from the state the Atlanta School System could not operate, as a great portion of the finances for Georgia schools is derived from the state.

For the court to order the Atlanta public schools to desegregate would be equivalent therefore to ordering them to close. Since the Legislature meets in January, 1960, and the next school term begins in September, 1960, there is therefore no delay caused by making the plan contingent upon the passage of legislation which will permit the Atlanta schools to carry through their plan without punitive action on the part of the state.

As then stated by the court, it was and is the feeling of the court that the people of Georgia

through their chosen representatives in the Legislature should be allowed to make the important decision as to whether they would prefer the closing of their schools on one hand, to the gradual desegregation of the schools on the other hand, pursuant to the plan under consideration.

(9) To guard against the contingency that certain portions of the proposed plan might hereafter be held invalid by the courts for any reason, the plan should contain a severability provision so that the elimination of any invalid test or standard would not cause the entire plan to fall. Compare *Shuttlesworth vs. Birmingham Board of Education*, 162 F.S., p. 372(7).

[Court's Ruling]

(10) By way of summary the rulings now made by the court are as follows:

(a) The plan submitted by the Board of Education must be amended on or before January 6, 1960, to provide for more expeditious administrative procedure (see paragraph 7 above).

(b) The plan must be amended so as to contain a severability provision (see paragraph 9 above).

(c) Standards referred to in paragraphs 4 and 5 above, relating to contemplated friction or breaches of the peace, shall be taken to contemplate factors other than racial discrimination. Factors concerning "economic retaliation" must be stricken from the plan (see paragraph 4 above).

(d) Standards involving psychological factors must be applied without reference to race or color, placements based upon the same must specifically designate the facts upon which the findings are made.

(11) Counsel for all parties have the right to move for amendment to this order based upon any misstatement of facts that might be contained therein. Further order of the court will be made on or after January 6 next when amendment to the plan is offered by defendants.

This the 30th day of December, 1959.

Amended Plan of January 19

Now come the defendants and pursuant to the order of the Court entered January 18, 1960 submit a resolution of the Atlanta Board of Education which they show was adopted January 18, 1960, further amending the proposed plan for the placement of pupils in the Atlanta School System, heretofore adopted by the Board of Education of the City of Atlanta on November 30, 1959, and amended January 4, 1960, so as to meet the requirements of the order of the Court of December 30, 1959 as supplemented by the order of the Court of January 18, 1960.

Defendants show that the proposed plan as finally amended by the resolution adopted January 18, 1960 meets the requirements of the order of the Court of December 30, 1959, and the order of the Court of January 18, 1960.

WHEREAS, the Atlanta Board of Education did, on November 30, 1959 adopt rules and procedure relating to the assignment, transfer and/or placement of pupils; and

WHEREAS, said rules and procedure were considered by the Honorable Frank A. Hooper, United States District Judge for the Northern District of Georgia and by an order and judgment entered December 30, 1959 he directed

that the same be amended in certain respects as set forth by said order and judgment; and

WHEREAS, said rules and procedure were amended by the Board and, as amended, were filed in the United States District Court for the Northern District of Georgia on January 5, 1960; and

WHEREAS, the Honorable Frank A. Hooper has given further consideration to said rules and by an order dated January 18, 1960 has set forth the further amendments to said rules and procedure which he deems to be proper,

NOW, THEREFORE, BE IT RESOLVED by The Atlanta Board of Education that said rules and procedure as adopted and promulgated by the Board on November 30, 1959 and as amended by the Board and adopted January 4, 1960, be further amended as follows:

1. By striking Paragraph 6 of said rules and procedure in its entirety and inserting a new Paragraph 6 as follows:

6. Applications for assignment or transfer of pupils must be filled in completely and legibly in ink or typewriter and must be signed by both parents or the parent to

whom the child has been awarded by court proceedings, or the legal guardian of each child for whom application is made. Further, the application must be notarized at the time it is filed. The Superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests and other investigations as he deems appropriate. In the absence of excuse, satisfactory to the Superintendent or the Board, failure to appear for any requested examination, test or interview by the child or parents or guardian will be deemed a withdrawal of the application.

2. By striking Paragraph 7 of said rules and procedure in its entirety and inserting a new Paragraph 7 as follows:

7. Notice of the action taken by the Superintendent on each application shall be mailed to the parents or guardian at the address shown on the application, within 30 days from the delivery of the application to the school principal, in no event later than June 15th. Such action shall be final unless a hearing before the Board is requested in writing within ten days from the date of mailing such statement.

3. By striking from Paragraph 8 the words "five days written notice" and inserting in lieu thereof "ten days written notice," so that Paragraph 8 shall read as follows:

8. A parent or guardian of a pupil may file in writing with the Atlanta Board of Education objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, or unless the Board deems a hearing necessary, the Board shall act upon the same within a reasonable time, stating its conclusions. If a hearing is requested or if the Board deems a hearing necessary with respect to the Superintendent's conclusion on an application, the parents or guardian will be given at least ten days' written notice of the time and place of the hearing. The hearing will be begun within twenty days from the receipt by the Board of the request or the decision by the Board that a hearing is necessary. Failure

of the parents or guardian to appear at the hearing will be deemed a withdrawal of the application.

4. By striking Paragraph 9 in its entirety and inserting a new Paragraph 9 as follows:

9. The Board may conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be deemed a final decision by the Board. The Board of Education may designate one or more of its members or one or more competent examiners to conduct any such hearing, take testimony, and report the evidence, with its recommendation, to the entire Board for its determination within ten days after the conclusion of such hearing. In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of any investigations and examinations.

5. By striking Paragraph 10 in its entirety and inserting a new Paragraph 10 as follows:

10. Unless postponement is requested by the parents or guardian, the Board will notify them of its decision within ten days after its receipt of the report of the examiner, or the conclusion of any hearing before the Board. Exceptions to the decision of the Board may be filed, within five days of notice of the Board's decision, and the Board shall meet promptly to consider the same: Provided, however, that every appeal shall be finally concluded by the Board before September 1st. Provided further that nothing herein contained shall be construed to deprive any person dissatisfied with the final decision of the Board of the right to appeal to the State Board of Education as provided by law.

6. The aforesaid Resolution of The Atlanta Board of Education adopted November 30, 1959, as heretofore amended and as hereby amended shall read as follows:

WHEREAS, The Atlanta Board of Education has been directed to present to the

Court by December 1, 1959, a plan designated to bring about compliance with the order of the Court of July 9, 1959; and

WHEREAS, The Atlanta Board of Education is making every effort to provide the Atlanta Public School System with the very best buildings, equipment, and other facilities and curricula for approximately 116,000 students; and

WHEREAS, The City of Atlanta is undergoing rapid urbanization, bringing an influx of children of varying degrees of achievement and ability due not only to individual aptitude but to educational opportunities heretofore available; and

WHEREAS, there is and has been much public construction in Atlanta, which together with other building has resulted in drastic changes in neighborhood patterns, and these changes will be greatly magnified by the proposed slum clearance program involving the vacating of more than 1,200 acres of land with the resultant displacement of families, and

WHEREAS, These factors result in not only a continuous influx of new students into the system, but in the continuous movement of students within the system, and also from the system into the suburban areas adjoining Atlanta; and

WHEREAS, The changing neighborhood patterns, the 39 million dollars worth of new school construction since 1948, the great influx of new students, and the continuous movement of students within the system has caused admission, assignment, transfer, and continuance of students in and to the various schools within the system to become a major problem of the administration; and

WHEREAS, Pending further studies and recommendations by the school authorities, the Board of Education considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with requests on behalf of pupils would be disruptive to orderly administration, and would tend to invite or induce disorganization and would impose an excessive burden on the available resources as well as the teaching and administrative personnel of the schools; and

WHEREAS, in September, 1960, there will be a shortage of 580 classrooms in Atlanta schools and many children are now on double sessions, housed in churches and facilities other than classrooms, and the Board realizes that continuous system-wide studies must be made to determine available seats for students and studies of achievement and ability of the students where these seats may exist as well as other factors consistent with the educational policies governing the admission, assignment, transfer, and placement of pupils in the public schools as will be prescribed in this document; and

WHEREAS, The State Board of Education has not promulgated rules and regulations relative to the placement of students in the schools, and this Board has the inherent power of pupil placement, and more complete regulations are necessary

NOW THEREFORE: To insure orderly procedures of uniform application for pupil assignment, transfer and/or placement, and to enable the continuing improvement of the educational advantages offered the following rules and procedure shall be followed:

1. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effects or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the possibility of threat or friction or disorder among pupils or others; the possibility of breaches of the peace or ill will; the effect of admission of the pupil upon the academic progress of other students

in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the ability to accept or conform to new and different educational environment; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

2. Subject to supervision and review by the Board, the City Superintendent of Schools shall have authority and be charged with responsibility with respect to the assignment (including original and all other admissions to the school system), transfer and continuance of pupils among and within all public schools operated under the jurisdiction of the Atlanta Board of Education.
3. The Superintendent shall have authority to determine the particular public school to be attended by each child applying for assignment or transfer, and no child shall be entitled to be enrolled or entered in a public school until he has been assigned thereto by the Superintendent or his duly authorized representative. All existing school assignments shall continue without change until or unless transfers are directed or approved by the Superintendent or his duly authorized representative.
4. Between May 1st and May 15th applications for the admission, assignment or transfer, and/or placement of pupils to or in particular schools shall be directed to the Superintendent of Schools and shall be delivered to the school principal unless otherwise directed by the Superintendent on forms provided by the Superintendent, and made available at the offices of the Board of Education. Such forms shall be delivered only on request of and to the applicant student or to his parent or legal guardian in person, by the principal of the school then attended by such student or by the Superintendent of Schools.
5. A separate application must be filed by each pupil desiring assignment or transfer to a particular school and no joint application will be considered.
6. Applications for assignment or transfer of pupils must be filled in completely and legibly in ink or typewriter and must be signed by both parents or the parent to whom the child has been awarded by court proceedings, or the legal guardian of each child for whom application is made. Further, the application must be notarized at the time it is filed. The Superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests and other investigations as he deems appropriate. In the absence of excuse, satisfactory to the Superintendent or the Board, failure to appear for any requested examination, test or interview by the child or the parents or guardian will be deemed a withdrawal of the application.
7. Notice of the action taken by the Superintendent on each application shall be mailed to the parents or guardian at the address shown on the application, within thirty days from the delivery of the application to the school principal, in no event later than June 15th. Such action shall be final unless a hearing before the Board is requested in writing within ten days from the date of mailing such statement.
8. A parent or guardian of a pupil may file in writing with the Atlanta Board of Education objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, or unless the Board deems a hearing necessary, the

Board shall act upon the same within a reasonable time stating its conclusion. If a hearing is requested or if the Board deems a hearing necessary with respect to the Superintendent's conclusion on an application, the parents or guardian will be given at least ten days' written notice of the time and place of the hearing. The hearing will be begun within twenty days from the receipt by the Board of the request or the decision by the Board that a hearing is necessary. Failure of the parents or guardian to appear at the hearing will be deemed a withdrawal of the application.

9. The Board may conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be deemed a final decision by the Board. The Board of Education may designate one or more of its members or one or more competent examiners to conduct any such hearing, take testimony, and report the evidence, with its recommendation, to the entire Board for its determination within ten days after the conclusion of such hearing. In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of any investigations and examinations.
10. Unless postponement is requested by the parents or guardian, the Board will notify them of its decision within ten days after its receipt of the report of the examiner, or the conclusion of any hearing before the Board. Exceptions to the decision of the Board may be filed, within five days of notice of the Board's decision, and the Board shall meet promptly to consider the same: Provided, however, that every appeal shall be finally concluded by the Board be-

fore September 1st. Provided further that nothing herein contained shall be construed to deprive any person dissatisfied with the final decision of the Board of the right to appeal to the State Board of Education as provided by law.

11. If, from an examination of the record made upon objections filed to the assignment of any pupil to a particular school, or upon an application on behalf of any pupil for assignment to a designated school, or another school to be designated by the Board, or from an examination of such pupil by the Board or its authorized representative, or otherwise, the Board shall determine that any such pupil is between his or her seventh and sixteenth birthdays and is mentally or physically incapacitated to perform school duties, or that any such pupil is more than sixteen years of age and is maladjusted or mentally or otherwise retarded so as to be incapable of being benefited by further education to the extent that further use of public funds for the education of such pupil is not justified, the Board may assign the pupil to some available vocational or other special school, or terminate the public school enrollment of such pupil altogether.
12. Beginning September 1, 1960, or on September 1, following favorable action by the General Assembly of Georgia, student assignment in the Atlanta Public School System shall be made in accordance with aforesaid rules and regulations and without regard to race or color. For the first school year in which it is effective, the plan shall apply to the students in the 12th grade. Thereafter, in each successive year, the plan shall be expanded to the immediate lower grade; e.g., in 1961-62—Grade 11, in 1962-63—Grade 10, etc., until all grades are included.
13. Nothing contained in this resolution shall be construed to prevent the separation of boys and girls in any school or grade, or to prevent the assignment of boys and girls to separate schools.

14. If any paragraph of these rules and procedure shall be held by any court of competent jurisdiction to be invalid for any reason, the remaining paragraphs shall continue of full force and effect. If any portion, clause or sentence of any paragraph shall be held by any court of competent jurisdiction to be invalid for any reason, the remainder of any such paragraph shall continue of full force and effect.
15. These rules and procedure shall be contingent upon the enactment of statutes by the General Assembly of Georgia permitting the same to be put into

operation, and shall be submitted to the General Assembly for approval. Counsel are directed to transmit copies to the President of the Senate and the Speaker of the House of Representatives upon authorization by the Court.

ORDER OF COURT,
JANUARY 20, 1960

The defendants on January 19, 1960 having filed amendment to the Plan of Operation for Atlanta Public Schools, which meets the requirements of previous Orders of the Court, said Plan as finally amended is herewith approved by the Court.

This the 20th day of January, 1960.

Order, Opinion of March 9, 1960

On Feb. 26, 1960, Plaintiffs filed with this Court a motion reciting in substance the following:

That this court on January 20, 1960, approved a plan as amended, submitted by the Atlanta Board of Education, providing for elimination of discrimination in the operation of its schools and providing that applications for assignment and transfer should be filed with the Atlanta school authorities between May 1st and May 15th of each year, but that approval of such plan was made contingent upon action of the Georgia Legislature permitting the same to be put in effect.

The motion points out that the Legislature met in January, but adjourned without enacting any laws permitting such plan to be put in effect, but that the Legislature did pass a resolution appointing a commission to study the entire question and to file a report on or before May 1, 1960.

[Legislative Committee]

Plaintiffs' present motion prays "that this court will enter an order directing defendants to proceed with their plan as finally approved by this court beginning May 1, 1960." A response filed by defendants pursuant to order of the court points out that the General Assembly of Georgia did adopt a resolution creating a "General Assembly Committee on Schools," a copy of the

resolution being attached to the motion and also a list of the nineteen members of the committee, giving as to each the official positions occupied by each member, and other information concerning each.

The court agrees with the statement made in the response to said motion "that the members of the committee, some or all of whom may be known to the court, are all reputable, high-class citizens of the State of Georgia" and that "respondents have every reason to believe that they are approaching the problems presented by the order of this court and the plan adopted by respondents in good faith," and that "the committee is now engaged in conducting hearings" and that "hearings will be conducted in every congressional district of the state."

The court also accepts as true the statement made in the response "that until the General Assembly Committee on Schools provided for by resolution of the General Assembly completes its hearings and makes its report and recommendations, it cannot be determined what action by the General Assembly will be recommended by the committee, and until the General Assembly considers such recommendation, it cannot be determined what final action will be taken thereon by the General Assembly, or what final action will be taken by the General Assembly upon the plan submitted to the court, and with the approval of the court submitted to the General Assembly."

This court during the progress of this case has repeatedly made the statement that the court would not commit itself as to what action the court would take beyond the date of adjournment of the session of the Legislature which convened in January, 1960. The adjournment of the Legislature without taking affirmative action toward permitting the Atlanta Board of Education to put its plan in effect does not come as any great surprise to all of our citizens who are familiar with campaign promises heretofore made by members of the General Assembly and familiar with the general misconceptions in the minds of perhaps a majority of the people of this state concerning the real questions at issue, and concerning the gravity of the decision which the Legislature is called upon to make.

However, failure of the Legislature to take such definite action at its recent session does not close the door necessarily to institution of respondents' plan, whether effective September, 1960, or September, 1961. The legislative committee will make its report on May 1, 1960. Under the respondents' plan, applications for assignment or transfer may be made between those dates.

However, the court is reserving its decision upon the question as to whether such Atlanta plan shall commence in the school year 1960 or at a later date, pending the report to be filed by said legislative committee on May 1st.

The court therefore, is denying said motion by plaintiffs for an order at this time directing said plan to begin in September, 1960, and is setting said motion for a hearing at 10 o'clock a.m. on Monday, May 9, 1960, at which time the court will consider the report of said legislative committee and any other matters that may then be brought to the attention of the court, and will then determine the question as to the date on which said Atlanta plan must become operative.

[Not Too Late]

If the plan is ordered operative as of September, 1960, as prayed by plaintiffs in this motion, it will not be too late, as applications for assignment and transfer not only could have been filed prior to that date, but could be filed for several days subsequent to that date and prior to May 15th. Reception of such applications by the Atlanta Board of Education would not be a violation of any Georgia law, nor a commit-

ment upon their part that the plan would begin in September, 1960.

This court on many occasions during the progress of this case has remarked that the decisions of the United States Supreme Court must be carried out by the courts, also that deliberation in carrying out the same is just as important as speed, and that no good purpose can be served by a district judge in delaying the enforcement of the Supreme Court decisions, unless during such periods of delay good faith efforts are being made by defendants in the case to work out a solution to the many difficult problems therein involved, too well known to require elaboration.

This court at the present time is not utterly without hope that the people of Georgia, when properly and adequately informed of the true issues in the matter, will adopt a course of action which will preserve the common schools of Georgia and avoid a closing of the same, which might bring on a disruption and damage requiring many years to repair.

This court also takes judicial cognizance of the fact that while the legislative committee has only held a few public meetings, that such meetings are giving to the people of this state an opportunity of full and free discussion, participated in by people of all races, colors and schools of thought. The meetings are also conducive to a better understanding upon the part of all of the citizens of Georgia of the real issues involved, and will better enable the citizens of this state to determine whether in the last analysis they would prefer to let the various local school authorities and the local citizens vitally interested therein decide for themselves the future conduct of such schools, or whether on the other hand, the citizens of our state through their chosen representatives in the Legislature would prefer to take the position that the elimination of discrimination will not be permitted in any school whatsoever, even though such disposition might eventuate in the closing of all schools.

In denying the prayers of the plaintiffs' motion at the present time this court is giving to movants a certificate as provided by Act of Congress to enable movants to take an appeal to the Circuit Court of Appeals upon any phases of this case as desired, including the previous Order of this Court which approved the Atlanta School Plan, and including the present denial by the court of plaintiffs' motion to put the same into

effect as of September, 1960, by an order passed at this time, rather than deferring such decision

until the hearing set by this court May 9, 1960, as aforesaid.

EDUCATION

Public Schools—Louisiana

STATE of Louisiana v. ORLEANS PARISH SCHOOL BOARD et al.

Civil District Court, Orleans Parish, Louisiana, Division "F," June 29, 1959, No. 364-138. Supreme Court of Louisiana, February 18, 1960, 118 So.2d 127.

SUMMARY: The Attorney General of Louisiana brought an action for declaratory relief against the Orleans Parish School Board and others in the Civil District Court for Orleans Parish, seeking an interpretation of a 1956 statute [1 Race Rel. L. Rep. 927 (1956)] dealing with the classification of public schools in "any city" of more than 300,000 population. The district court concluded that the Act reserved to the state legislature the right to classify schools as all white, all Negro, or "mixed" or integrated. An intervenor-defendant, a citizen and taxpayer of Orleans Parish, appealed to the state supreme court contending that the statute is not susceptible to an interpretation whereby schools could be classified "mixed" or integrated. The supreme court held that the case does not come within any of the seven classes of appellate jurisdiction granted it by the state constitution, because the lower court had merely construed the statute and had not held it to be invalid. The case was therefore transferred to the Orleans Parish Court of Appeal, which was held to have jurisdiction. The reasons for judgment and the judgment of the district court, and the supreme court decision are reprinted below. [See also, *Orleans Parish School Board v. Bush*, 268 F.2d 78, 4 Race Rel. L. Rep. 581 (5th Cir. 1959)].

RAINOLD, Judge:

REASONS FOR JUDGMENT

This is a suit for a declaratory judgment, filed by the State of Louisiana through its Attorney-General, against the Orleans Parish School Board and thirty-nine individuals who were parties plaintiff on behalf of their minor children in an action in the United States District Court entitled "Earl Benjamin Bush v. The Orleans Parish School Board et als" in the United States District Court, Eastern District of Louisiana, New Orleans Division, No. 3960.

[Statute To Be Interpreted]

The State, through its Attorney General, seeks to have this court interpret Act 319 of 1956, and particularly Section IV thereof which reads as follows:

Section IV. The President of the Senate shall appoint two (2) members from that body, and the Speaker of the House shall appoint two (2) members from the House of Representatives who shall serve as the Special School Classification Committee of the Louisiana Legislature, which Committee

shall have the power and authority to classify any new public school erected or instituted, or to re-classify any existing public school, in any city covered by the other provisions of this Act, so as to designate the same for the exclusive use of children of the white race or for the exclusive use of children of the Negro race. Any such classification or reclassification shall be subject to confirmation by the Legislature of Louisiana at its next regular session, said confirmation to be accomplished by concurrent resolution of the two houses of the Legislature. It is clearly understood that the Legislature of the State of Louisiana reserves to itself the sole power to classify or to change the classification of such public schools from all white to any other classification, or from all Negro to any other classification, and the action of the Special School Classification Committee as recited herein above shall not become final until properly ratified by the Legislature.

Plaintiff asks this court to declare that Section IV provides for the classification of public schools in the cities wherein the Act is applicable

(cities with a population in excess of 300,000) by giving to the Legislature the exclusive authority to integrate any school or schools in such cities.

The individual defendants were cited, but no answer was filed on their behalf. The Orleans Parish School Board filed an answer admitting the allegations of plaintiff's petition.

[Intervention Filed]

Intervention was filed by Martin Gurtler, II, a resident of the Parish of Orleans, in which he seeks a judgment declaring that Act 319 of 1956 provides for the classification of public schools by the Legislature only as segregated white or Negro schools.

Preliminary default was entered on May 8, 1959, against the defendants who were served in the original action; however, no confirmation of this default has been sought by the State of Louisiana.

The case was set down for trial on June 22, 1959, and the State offered in evidence a certified copy of Act 319 of 1956, together with a per curiam of the United States District Court for the Eastern District of Louisiana, in the matter entitled "Bush vs. Orleans Parish School Board," previously referred to.

It will be noted that the constitutionality of Act 319 of 1956 is not before the court for decision. Under the law of the State of Louisiana, the constitutionality of an Act of the Legislature cannot be passed upon by means of a declaratory judgment.

[Question Before Court]

The only question presently before the court is an interpretation by the court of this Section IV of Act 319 of 1956.

Section IV provides that the President of the Senate shall appoint two members of the Senate, and the Speaker of the House shall appoint two members of the House of Representatives as a Public School Classification Committee of the Legislature, and it gives to that committee the power and authority to classify schools for the exclusive use of children of the white race or the exclusive use of children of the Negro race, and any such classification is subject to confirmation by the Legislature of

the State of Louisiana at its next regular session by concurrent resolution of its two houses.

By the next sentence of this Section, the Legislature of the State of Louisiana reserves unto itself the power to classify or to change the classification of public schools "from all white to any other classification, or from all Negro to any other classification," and "the action of the Classification Committee of the Legislature shall not become final until ratified by the Legislature."

Thus the Legislature reserves unto itself the right to classify, finally, schools as all white or all Negro, and reserves unto itself exclusively the right to classify a public school as "mixed", or "integrated".

There will be judgment in accordance with these reasons.

JUDGMENT

This cause heretofore came for trial on June 22nd, 1959, and was heard and submitted to the Court for adjudication on that day.

Present: William P. Schuler and John E. Jackson, Jr., attorneys for the plaintiff, Gerard A. Rault, attorney for the defendant, Orleans Parish School Board, Louis B. Porterie, attorney for the intervenor.

The Court, after considering the pleadings, evidence, and the argument of counsel, and being of the opinion, for the reasons this day dictated to the stenographer, reduced to writing, and made a part of the record of these proceedings:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, State of Louisiana, and against the defendant, Orleans Parish School Board, and the intervenor, Martin M. Gurtler, decreeing that Section IV of Act 319 of 1956, reserved unto the Legislature of the State of Louisiana, itself, the right to classify finally, schools as all white or all Negro, and reserves unto itself exclusively the right to classify a public school as "mixed", or integrated.

Judgment read and rendered in open Court on June 29th, 1959.

Judgment read and signed in open Court on July 3rd, 1959.

Louisiana Supreme Court Opinion

SIMON, Justice.

This suit was instituted by the Attorney General of Louisiana on behalf of the State of Louisiana under the provisions of the self-styled "Uniform Declaratory Judgments Act" (Act 431 of 1948, Act 22 of the Extraordinary Session of 1948), now LSA-R.S. 13:4231 et seq., wherein the interested parties seek a court interpretation of the language of one sentence¹ contained in Act 319 of 1956, LSA-R.S. 17:341 et seq., dealing with the classification of public schools by the Legislature of the State of Louisiana, as to whether attendance would be upon a basis of only white pupils at certain schools and only Negro pupils at certain schools, or the attendance by pupils of both races at certain schools so classified by the Legislature, but, in any event, that the exclusive authority to integrate any school or schools has been reserved to the Legislature of the State of Louisiana.

[Interpretation Sought by Intervenor]

Among other individuals, the Orleans Parish School Board was named defendant. In the course of the litigation a petition of intervention was filed by Martin M. Gurtler, II, a citizen, property owner, and taxpayer of the Parish of Orleans, Louisiana, who asserted that the act in question is susceptible to only one interpretation and that is that the Legislature of the State of Louisiana reserved to itself only the right to classify the public schools affected by said Act as white or Negro schools but not as mixed schools attended by pupils of both white and Negro races. After the filing of this intervention, the State of Louisiana amended its original petition so as to make said intervenor a defendant. After a hearing on the merits judgment was rendered by the District Court interpreting the statute in question to the effect that Act 319 of 1956 reserved unto the Legislature of this State, itself, the right to finally classify schools as all white or all Negro, and reserved unto itself, exclusively, the right to classify a

public school as "mixed" or integrated. The intervenor and defendant prosecutes this appeal contending that the statute is not susceptible to an interpretation whereby schools could be classified "mixed" or integrated schools with white and Negro pupils attending the same schools.

[Court's Appellate Jurisdiction]

Whilst the appellate jurisdiction of this Court is not raised by either of the interested parties, it is nevertheless the duty of the Court to consider its jurisdiction *ex proprio motu*.

The appellate jurisdiction of the Supreme Court, as fixed and established by Section 10 of Article 7 of the Constitution of 1921, LSA, extends to seven different classes of cases as enumerated therein; and in the Succession of Solari, 218 La. 671, 50 So.2d 801, in which was cited the case of First Nat. Life Ins. Co. v. City of New Orleans, 218 La. 9, 48 So.2d 145, and thereafter approving cited in the case of Krokroskia v. Martin, 220 La. 992, 58 So.2d 205, we held that this Court will not take appellate jurisdiction of a suit for a declaratory judgment unless the case is one which falls within one of the classifications set out in the cited articles of the Constitution, *supra*. This principle was again enunciated by us in the case of Nolen v. Bennett, 238 La. 364, 115 So.2d 381.

Obviously, this suit does not come within the first class enumerated in the constitutional provisions, *supra*, which provides that this Court has appellate jurisdiction in civil suits " * * * where the amount in dispute, or the fund to be distributed, irrespective of the amount therein claimed, shall exceed two thousand dollars exclusive of interest * * *". The phrase "amount in dispute," as used, necessarily includes within its meaning the value of a thing or right where it, instead of an amount, is in dispute. See Nolen v. Bennett, *supra*, and authorities therein cited. Nowhere in the pleadings are there any allegations as to the value of the amount in dispute or of the value of the right therein affirmatively shown. Upon a close scrutiny of the record we find that it fails to contain any affirmative evidence of a monetary demand or dispute as between the parties.

A perusal of the record will readily disclose that this suit does not come within the last six classifications enumerated in Article 7, Section

1. " * * * It is clearly understood that the Legislature of the State of Louisiana reserves to itself the sole power to classify or to change the classification of such public schools from all white to any other classification, or from all Negro to any other classification, and the action of the Special School Classification Committee as resited hereinabove shall not become final until properly ratified by the Legislature." Acts 1956, No. 319, Sec. 4.

10. It appears to us that the only issue, if it can be so called, or the only matter which is presented to this Court, is a request for adjudication on the interpretation or construction to be placed upon the statute in question. The constitutionality of that statute has not been assailed; and it is well settled that the mere interpretation or construction of the articles of the Constitution (equally applicable to statutes of this State) does not of itself vest this Court with jurisdiction except where the lower court has declared them to be invalid and of no legal effect. *State ex rel. Village of Roseland v. Addison*, 233 La. 708, 98 So.2d 160.

[Constitution Limits Jurisdiction]

The appellate jurisdiction of the Court of Appeal, as fixed and established by Section 29 of Article 7 of the Constitution, and as therein provided, extends "to all cases, civil and probate, of which the Civil District Court for the Parish of Orleans, or the District Courts throughout

the State, have exclusive original jurisdiction, regardless of the amount involved, or concurrent jurisdiction exceeding one hundred dollars, exclusive of interest, and of which the Supreme Court is not given jurisdiction, except as otherwise provided in this Constitution, * * *". (Italics ours.)

Undoubtedly the original jurisdiction in the instant case being vested exclusively in the Civil District Court for the Parish of Orleans, and convinced as we are that we are without jurisdiction and that appellate jurisdiction is vested in the Court of Appeal for the Parish of Orleans, it becomes necessary for us, in the exercise of our discretion, to transfer the case to that Court.

For the reasons assigned it is ordered that this case be transferred to the Court of Appeal for the Parish of Orleans, provided that the appellant shall file the record in that Court within thirty days from the date this decree shall become final, otherwise that this appeal be dismissed and that the cost of this Court be paid by the appellant.

EDUCATION

Public Schools—North Carolina

Valarie McCoy, et al. v. GREENSBORO CITY BOARD OF EDUCATION, a Body Politic of Guilford County, North Carolina.

United States District Court, Middle District, North Carolina, Greensboro Division, January 14, 1960, 179 F.Supp. 745.

SUMMARY: After their applications for reassignment from a colored school to a named white public elementary school had been denied, four Greensboro, North Carolina, Negro children brought a class action in federal court against school officials, seeking a declaratory judgment of their rights to attend city schools without racial discrimination, and an injunction restraining the city board of education from refusing to assign them to the named school "or such school as plaintiffs would attend if they were white." In May, 1959, the board assigned three plaintiffs to the specified elementary school and the fourth, who had been promoted to the seventh grade, to a certain junior high school. It also decided to combine the colored school at which plaintiffs had been in attendance with the previously all-white elementary school to which the three plaintiffs were being assigned, all students of both schools to be assigned to the latter school for the 1959-1960 term. In July, 1959, the board approved applications of all white students thereby affected for reassignment to other city or county elementary schools, including one school to which some Negro children had previously been assigned. In August, 1959, the board granted transfer requests of all the white teachers who had formerly taught at the school to which the three plaintiffs were being assigned and elected Negro teachers and a Negro principal to fill the vacancies thereby created. The three elementary school plaintiffs then moved for leave to file a supplementary complaint alleging that the actions of the board since May, 1959, are a part of defendant's general pattern "in assigning, reassigning and transferring pupils and teachers on the basis of race in order to maintain and perpetuate, except for token compliance with the Fourteenth Amendment . . . racial segregation in the city school system," and praying for an order (1) restraining the

board from engaging in any action that regulates or affects on a racial basis the admission, enrollment, and education of plaintiffs and their class in the city schools, and (2) requiring the board to present a plan for a systematic and effective method for promptly eliminating racial discrimination within city schools. Since plaintiffs could assert their constitutional rights under the state pupil assignment act only as individuals and not as a class, and since admittedly all the plaintiffs eligible to attend the school specified in the original complaint had been assigned to that school, and none of them had exercised their statutory administrative remedy of applying for reassignment to any other school, the court held that it could not interfere with local school administration by granting relief under the proposed supplemental complaint and, therefore, denied the motion to file it. Defendants' motion for summary judgment was granted because the only legal issue presented by the original complaint had become moot when plaintiffs were assigned to the school specified therein.

STANLEY, District Judge.

This class action was commenced on February 10, 1959, by Valarie McCoy, Eric McCoy, and Thetus McCoy, minors, by their father and next friend, Readell McCoy, and Michael Anthony Tonkins, a minor, by his father and next friend, James Tonkins, Jr., against the Greensboro City Board of Education, The North Carolina Advisory Committee on Education, and the North Carolina State Board of Education, and individual members of those bodies, to have declared the rights of the minor plaintiffs and the class of persons they represent to attend the public schools of the City of Greensboro without discrimination on account of race or color, and for injunctive relief. All the plaintiffs are Negro citizens of the City of Greensboro and the minor plaintiffs are all eligible to attend the Greensboro Public Schools.

[Undisputed Facts]

The essential facts are not in dispute.

Among other schools operated by the Greensboro City Board of Education (hereafter sometimes referred to as the "Board"), during the 1957-58 school year, were Washington School, an elementary school attended solely by Negro children, and Caldwell School, an elementary school attended solely by white children. The Pearson Street Branch of the Washington School, which was an integral part of Washington School, was located on the campus of Caldwell School. The Pearson Street Branch of Washington School was also attended solely by Negro children.

During the 1957-58 school year, the minor plaintiffs, Valarie McCoy, Eric McCoy and Thetus McCoy, had been assigned to and attended the Pearson Street Branch of the Washington School. The minor plaintiff, Michael Anthony Tonkins, was not of school age during

the 1957-58 school year, but was eligible to be enrolled in the first grade at the commencement of the 1958-59 school year.

At a regular meeting of the Board held on May 20, 1958, all of the said McCoy children were again assigned to the Pearson Street Branch of the Washington School for the 1958-59 school year, and notices of said assignments were given to the parents of said children. On June 13, 1958, Readell McCoy, the father of Valarie McCoy, Eric McCoy and Thetus McCoy, filed separate applications with the Board requesting that each of the said children be reassigned to the Caldwell School for the 1958-59 school year. The following reasons were given in each instance as to why reassignment was desired: Geographical location; school is only four blocks away; no cafeteria, assembly, and no other extra-curricular activities. At a meeting of the Board held on August 11, 1958, the applications for reassignment of the three McCoy children were denied, and their father was thereafter duly notified by registered mail of the action of the Board. On August 18, 1958, notice of appeal with reference to the three McCoy children was received by the Board, and on September 12, 1958, Readell McCoy was notified that the appeals would be heard at 7:30 o'clock P.M. on September 16, 1958. The appeals were heard as scheduled, and at an adjourned meeting of the Board held on September 17, 1958, each appeal was denied. Readell McCoy was duly notified of the action of the Board.

[Applications Denied]

On June 16, 1958, James Tonkins, Jr., father of the minor plaintiff, Michael Anthony Tonkins, filed an application with the Board requesting that his son be enrolled in the first grade at Caldwell School for the 1958-59 school year. No action was taken on this application. On Sep-

tember 3, 1958, James Tonkins, Jr., took his minor son to the Caldwell School and asked that he be enrolled in the first grade at that school. This request was denied and the father was advised to take said child to the Pearson Street Branch of the Washington School for enrollment, which was done. On September 4, 1959 [sic], James Tonkins, Jr., filed a formal application for the reassignment of his son, Michael Anthony Tonkins, from the Pearson Street Branch of the Washington School to the Caldwell School. The reason given for requesting the reassignment was that the father did not believe his child could receive the maximum advantages offered by public schools in a racially segregated school, that Caldwell School was closer to his residence, and that the facilities and program offered at the Pearson Street Branch of the Washington School were inferior to the facilities at the Caldwell School. At a regular meeting of the Board held on September 16, 1958, the application for the reassignment of Michael Anthony Tonkins was denied, and his father was duly notified of such action the following day. On September 19, 1958, James Tonkins, Jr., filed with the Board a notice of appeal, which said appeal was duly heard by the Board on October 21, 1958, after due notice had been given to the father of said child of the date of hearing. The appeal was denied, and the father was so notified.

[Action Commenced]

Thereafter, this action was commenced. The complaint, which was filed on February 10, 1959, alleges, in substance, in addition to the facts summarized above, that it was filed as a class action; that the defendants, North Carolina State Board of Education and The North Carolina Advisory Committee on Education, had counseled with the defendant, Greensboro City Board of Education, for the purpose of preventing desegregation of the public schools, or keeping such desegregation to a minimum; that the minor plaintiffs were denied reassignment to the Caldwell School solely because of their race; and that the defendant, Greensboro City Board of Education, while purporting to maintain a system of permitting transfers among schools without regard to race, actually maintains a system which results in racial discrimination. The plaintiffs then ask for an injunction restraining the defendant, Greensboro City Board of Education, from continuing to pursue a policy

of operating the public schools of the City of Greensboro on a racially segregated basis and "enjoining it from refusing to assign or reassign the minor plaintiffs on a non-racial basis to the Caldwell School proper or such school as plaintiffs would attend if they were white." The plaintiffs further seek to enjoin the North Carolina State Board of Education and The North Carolina Advisory Committee on Education from counseling or working in concert with the Greensboro City Board of Education, and other boards of education within the State of North Carolina, "for the purpose of preventing desegregation of the schools of the State of North Carolina or keeping such desegregation to a minimum." All the defendants timely answered and set up various defenses.

At a meeting of the Board held on May 26, 1959, Eric McCoy, Valarie McCoy and Michael Anthony Tonkins were duly assigned to the Caldwell School for the 1959-60 school year. The fathers of each of said children were notified of the action of the Board on June 5, 1959. Pursuant to said assignment, each of said children entered the Caldwell School at the commencement of the 1959-60 school year and all are still enrolled at said school. None of the said children, nor anyone on their behalf, have filed any further application for reassignment to another school.

Thetus McCoy was promoted to the seventh grade at the end of the 1957-58 school year and, since the seventh grade was not taught at either the Washington School or the Caldwell School, and he was ineligible to attend either of said schools, it was necessary that he be assigned to another school for the 1959-60 school year. At a meeting of the Board held on May 26, 1959, Thetus McCoy was duly assigned to the Lincoln Junior High School, a junior high school operated by the Board, for the 1959-60 school year, and his parents were duly notified of such assignment on June 5, 1959. Thetus McCoy duly enrolled at the Lincoln Junior High School for the 1959-60 school year and is still enrolled at said school. Neither said minor plaintiff, nor anyone on his behalf, has filed any further application for reassignment to another school.

[Schools Combined]

At a meeting held on May 26, 1959, the Board adopted a resolution combining the Pearson Street Branch of the Washington School with the Caldwell School, and assigned all the pupils

attending both schools, with exception of sixth grade students who were being promoted to a junior high school, to the Caldwell School for the 1959-60 school year. The parents of the students at both schools were duly notified of the assignments on June 5, 1959.

During the period from June 5, 1959, to June 15, 1959, a total of 351 applications for reassignment of pupils from various schools in the Greensboro school system were received by the Board. Among said applications for reassignment were 245 applications from parents of white children who had been assigned to the Caldwell School. Some of these applicants sought reassignment to other schools in the Greensboro school system, and some sought permission to enroll in schools operated by the Guilford County Board of Education. At a regular meeting of the Board held on July 21, 1959, all the applications of the white Caldwell pupils were favorably considered. However, 191 of these applicants were reassigned to the Gillespie Park School, which, since the opening of the 1958-59 school year, has been, and still is, operated by the Board as an integrated school. On August 14, 1959, the Board granted the request of 42 teachers for transfer in the Greensboro school system, including all nine white teachers who had taught at the Caldwell School during the 1958-59 school year. On August 18, 1959, the Board elected W. A. Goldsborough, a Negro, principal of the Caldwell School, and on the same date seven additional teachers, all Negroes, were elected to teach at the Caldwell School during the 1959-60 school year. As a result of the various actions of the Board, Caldwell School has, during the current 1959-60 school year, been operated as an elementary school attended solely by Negro pupils and staffed solely by a Negro faculty.

[Motions Filed]

On September 23, 1959, the plaintiffs filed a motion for leave to file supplemental complaint, pursuant to Rule 15 (d), Federal Rules of Civil Procedure, 28 U.S.C.A., setting out the transactions, occurrences and events that had happened since the date of the filing of the original complaint. On October 16, 1959, the defendant, Greensboro City Board of Education, filed a motion for summary judgment pursuant to Rule 56(b) and (c), Federal Rules of Civil Procedure, 28 U.S.C.A., on the ground that the controversy existing between the plaintiffs and said

defendants had come to an end and the case had become moot. When the matter came on before the court for oral arguments on the motion of the plaintiffs for leave to file supplemental complaint, and the motion of the defendant, Greensboro City Board of Education, for summary judgment, on October 27, 1959, it was announced that the plaintiffs did not oppose the entry of a judgment dismissing the action against The North Carolina Advisory Committee on Education and the North Carolina State Board of Education, and individual members of those bodies. Accordingly, a final judgment dismissing the action as to those defendants was entered on November 7, 1959. Thereafter, on November 10, 1959, the plaintiffs filed a motion to continue the ruling on the pending motions to enable them to take certain depositions. The matter is now before the court for a ruling on all pending motions.

I

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

The proposed supplemental complaint simply alleges the action of the Board in consolidating Caldwell School and the Pearson Street Branch of the Washington School; the assignment of the minor plaintiffs, except Thetus McCoy, to the Caldwell School for the 1959-60 school term; the reassignment of all white pupils from Caldwell School to other schools attended exclusively, or almost exclusively, by white pupils, although many of such white pupils lived nearer the Caldwell School than the school to which assigned; and the replacement of the all-white faculty at Caldwell School with an all-Negro faculty. It is further alleged that these actions on the part of the Board were a part of its general pattern of actions throughout the Greensboro school system "in assigning, reassigning and transferring pupils and teachers on the basis of race in order to maintain and perpetuate, except for token compliance with the Fourteenth Amendment to the United States Constitution, racial segregation in the city school system." The proposed supplemental complaint then prays for the entry of a permanent injunction restraining the Board from engaging in any action that regulates or affects, on the basis of race or color, the admission, enrollment, or education of the minor plaintiffs, or any other Negro children similarly situated, in the public schools of the City of Greensboro, and that the Board be required to present to the

court for its approval a complete plan for a systematic and effective method for eliminating racial discrimination within the city school system with the least practicable delay.

[A Recurring Question]

The identical question presented by the motion for leave to file supplemental complaint has been presented to the courts time and again. Each time it has been held that under the North Carolina Enrollment and Assignment of Pupils Act,¹ relief in cases of this type must be sought as individuals, not as a class or group. *Carson v. Board of Education of McDowell County*, 4 Cir., 1955, 227 F.2d 789; *Carson v. Warlick*, 4 Cir., 1956, 238 F.2d 724, certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664; *Covington v. Edwards*, D.C.M.D.C.C. 1958, 165 F.Supp. 957, affirmed 4 Cir., 1959, 264 F.2d 780, certiorari denied 1959, 361 U.S. 840, 80 S.Ct. 78, 4 L.Ed. 2d 79; *Holt v. Raleigh City Board of Education*, D.C.E.D.N.C.1958, 164 F.Supp. 853, affirmed 4 Cir., 1959, 265 F.2d 95, certiorari denied 1959, 361 U.S. 818, 80 S.Ct. 59, 4 L.Ed.2d 63; *McKissick v. Durham City Board of Education*, D.C.M.D.N.C.1959, 176 F.Supp. 3.

It has further been repeatedly stated that the *Brown*² cases do not require integration, but only hold that states can no longer deny anyone the right to attend a school of his choice on account of race or color. *Briggs v. Elliott*, D.C.E.D.S.C.1955, 132 F.Supp. 776; *Thompson v. County School Board of Arlington County*, D.C.E.D.Va.1956, 144 F.Supp. 239; *School Board of City of Newport News, Va. v. Atkins*, 4 Cir., 1957, 246 F.2d 325; *Covington v. Edwards*, D.C.M.D.N.C.1958, 165 F.Supp. 957, affirmed 4 Cir., 1959, 264 F.2d 780; *McKissick v. Durham City Board of Education*, D.C.M.D.N.C.1959, 176 F.Supp. 3.

These firmly established legal principles have been extensively discussed in the cases cited, and a further discussion here is unnecessary. It is sufficient to restate once again that these cases uphold the constitutionality of the North Carolina Pupil Assignment law, and plainly hold that Federal Courts should not be asked to interfere in the administration of local schools until plaintiffs in cases of this type have ex-

hausted their administrative remedies under that law.

[Plaintiffs Admitted to Chosen School]

Admittedly, all the minor plaintiffs, except Thetus McCoy, have now been admitted to the school of their choice. Since Thetus McCoy was promoted to the seventh grade at the end of the 1958-59 school year, which grade is not taught in the Caldwell School, the court would be powerless to order him admitted to that school. No application has been made by or on behalf of any of the minor plaintiffs for reassignment to another school. Actually, the plaintiffs are now complaining of the action taken by the Board in reassigning white pupils, not the action taken on their own application for reassignment. The plaintiffs frankly state in their brief that they originally sought admission to a particular school "only for the purpose of obtaining desegregation." The record establishes the fact that the Greensboro School Board has integrated a number of schools under its supervision. For example, Gillespie Park School, to which 191 of the 245 white pupils were reassigned from the Caldwell School, is an integrated school.

Since there can be no doubt but that the plaintiffs must assert this constitutional right as individuals, and not as a class, and since it is admitted that all the minor plaintiffs eligible to attend Caldwell School have been admitted to and are now attending that school, and none has applied for reassignment to another school, it follows that the court could grant no relief under the proposed supplemental complaint, and that the motion of the plaintiffs to file same should be denied.

II

MOTION OF THE DEFENDANT, GREENSBORO CITY BOARD OF EDUCATION, FOR SUMMARY JUDGMENT.

The plaintiffs do not seriously contend that they are entitled to any relief under the original complaint. For the reasons previously pointed out, the only relief which the court could possibly grant would be an injunction requiring the Board to admit the eligible minor plaintiffs to the Caldwell School upon a finding that they had exhausted their administrative remedies under the North Carolina Enrollment and Assignment of Pupils Act, and that they were denied admission on account of their race

1. Sections 115-176 through 115-179, General Statutes of North Carolina.

2. *Brown v. Board of Education*, 1954, 347 U.S. 483, 484, 74 S.Ct. 686, 98 L.Ed. 873; *Brown v. Board of Education*, 1955, 349 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.

or color. The record is not clear as to whether or not any of the plaintiffs adequately exhausted their administrative remedies before the commencement of this action. The original complaint does not make such an allegation. However, a determination of this fact is unnecessary since the eligible minor plaintiffs were later admitted to schools specified in their applications for reassignment.

Since it is now uncontroverted that the minor plaintiffs eligible to attend the Caldwell School have been assigned to and are now attending that school, the only legal question presented has become moot, and there remains nothing for the court to adjudicate. *Bogges v. Berry Corp.*, 9 Cir., 1956, 233 F.2d 389; *United States v. Alaska S. S. Co.*, 1920, 253 U.S. 113, 40 S.Ct. 448, 64 L.Ed. 808.

It follows that the motion of the defendant, the Greensboro City Board of Education, for summary judgment, should be allowed.

III

MOTION OF THE PLAINTIFFS FOR CONTINUANCE

In view of the ruling on the motion of the plaintiffs for leave to file supplemental complaint, and motion of the defendant, the Greensboro City Board of Education, for summary judgment, there is no necessity for a discussion of the motion of the plaintiffs to continue the proceedings in order to give them an opportunity to take depositions in support of the allegations in the proposed supplemental complaint. There would obviously be no necessity for establishing these allegations if they afford no basis upon which the court could grant any relief.

Counsel for the defendant, the Greensboro City Board of Education, will prepare and present to the court a judgment in conformity with this opinion.

EDUCATION

Public Schools—Tennessee

Josephine GOSS et al. v. THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE et al.

United States District Court, Eastern District, Tennessee, Northern Division, February 8, 1960, Civil Action No. 3984.

SUMMARY: Negro children in Knoxville, Tennessee, brought an action in federal court against city school officials, alleging a practice or custom by the latter of failing or refusing to admit plaintiffs to white schools in violation of the Fourteenth Amendment. The complaint contained six prayers for relief, including one for an order requiring defendants to submit to the court a complete plan designed to bring about good faith compliance with the decision in the *School Segregation Cases* by providing for a prompt and reasonable start of desegregation of city schools and a systematic and effective method for the accomplishment thereof. The court ordered defendants to submit such a plan by April 8, 1960; but, pending compliance therewith, it withheld action on the other prayers. Plaintiffs were given ten days following the filing of the plan to file objections thereto.

TAYLOR, District Judge.

ORDER

This cause was heard on February 8, 1960, upon plaintiffs' complaint and prayers for a temporary restraining order, preliminary injunction, for declaration of the rights and legal relations of the parties, for an order declaring unconstitutional and void the alleged practice or custom of defendants' alleged failure or refusal to admit plaintiffs to white schools because of race or color in violation of the Fourteenth

Amendment of the Constitution, for a permanent injunction restraining defendants from enforcing the aforementioned alleged practice and custom, and for an order requiring defendants to present to this Court a complete plan designed to bring about a good faith compliance with the decision of the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 and 349 U.S. 294 at the earliest practical date throughout the public school system of Knoxville which shall provide a prompt and reasonable start of desegregation of City schools and

a systematic and effective method for accomplishing such desegregation with all deliberate speed; and, the Court, after examination of the answer of defendants and the supporting brief of plaintiffs and after hearing argument of counsel and after questioning them with respect to the pertinent questions involved in the suit, submitted to counsel for the defendants the specific question when the defendant Members of the Board of Education expected to submit a plan in accordance with the sixth and last prayer of the complaint, to which counsel replied that the Board would like to have until June 15, 1960, to submit such plan. Thereupon, counsel for plain-

tiffs stated that they felt that a plan should be submitted on or before April 1, 1960. The Court then fixed the date as April 8, 1960.

Pending the submission of such plan on or before April 8, 1960, the Court withholds any action upon the five remaining prayers of the complaint. Plaintiffs shall have 10 days following the filing of the plan within which to file objections thereto.

The plaintiffs except to the action of the Court in withholding action upon their prayers for a temporary restraining order and preliminary injunction pending the submission of the plan.

EDUCATION

Public Schools—Virginia (Alexandria)

Otis E. JONES et al. v. SCHOOL BOARD OF THE CITY OF ALEXANDRIA, VIRGINIA et al.; Vickie Belk et al., Plaintiff-Intervenors.

United States District Court, Eastern District, Virginia, Alexandria Division, December 29, 1959, 179 F.Supp. 280.

SUMMARY: A federal court action by Negro children against Alexandria, Virginia, school officials resulted in a judgment enjoining defendants from refusing to admit any child to a school on account of race or color and ordering them not to refuse to admit nine plaintiffs to specified white schools. — F.Supp.—, 4 Race Rel. L. Rep. 29 (E.D. Va. 1959). Subsequently, seventeen other Negro students intervened, alleging that defendant school board had violated the injunction by refusing to admit them to certain city schools solely because of their race or color. The court found that the board had applied six previously approved criteria in passing upon all transfer requests of both white and Negro children, with no proof of bad faith. Relative to the criterion of "academic and mental capacity," the court refused to hold that a group mental test given to all children irrespective of race was unacceptable as a matter of law or to condemn as arbitrary and capricious the board's preference for actual accomplishment over I.Q. The court then ordered the admission of eight intervenors to specified white schools upon determining that their transfer requests had been improperly denied. Of these, three had been rejected because of deficient "academic achievement," but the court found in each case that several white children on or below their level had been enrolled in the same grade of the school to which they had applied; another, because official records failed to show attendance in certain previous grades, but the court considered this defect cured by her successful attendance and completion of subsequent grades with official permission; and four others, because of factors affecting their "mental or emotional stability," but the court found no evidential basis warranting rejection. Defendants' determinations upon the requests of the other nine intervenors were not altered. In eight of these cases, the court refused to declare that the disqualifications for deficient "academic achievement" level were discriminatory when the individual's level was either lower than anyone else's in his grade in the school to which he had applied or equalled that of only one or two "repeaters" at the bottom of the grade. In regard to the ninth child, whose home was "equidistant" from a Negro school and a white school, the court declined to overrule the transfer application denial even though it was alleged that the white school was 62 paces nearer and that white children formerly occupying the house had attended the white school. The court denied, as neither necessary, expeditious, nor in aid of the parties, intervenors' request to direct defendants to present a desegregation plan dividing the city into school districts and prescribing that all children in a

district shall attend the school in that district. The court also refused to rule defendants in contempt of its previous order, because they had been warranted in most of their determinations and because it deemed other of its restraints and correctives more fitting and effectual in dealing with abuses of administrative discretion.

BRYAN, Chief Judge.

The defendants' refusal to admit seventeen Negro pupils to certain schools in the City of Alexandria contravenes the injunction heretofore issued in this cause, the latest pleadings allege, in that the rejections were solely for race or color. Upon this issue the court makes the following fact findings with its legal conclusions thereon:

THE PLAN REQUESTED

I. Intervenor at trial asked the court to direct the defendants to present a plan of desegregation consisting of a division of the City into school districts and prescribing that all children, white and Negro, within a district shall attend the school of that district. Aside from the power of the court to require that character of plan, and apart from the many other questions which would arise upon such a decree, the request ought now to be denied. Neither necessity, nor expedition, nor aid to the parties discloses the advisability of such an order. No matter the formulae or artificialities adopted, each contested administrative decision must ultimately be considered on its peculiar facts.

In recompense, these individual studies though tedious and tasking could lead to a clearer understanding and a freer recognition by the parties of their reciprocal obligations—something more enduring and of greater force than an injunction of any kind.

CONTEMPT

II. To compel ready admissions in the future, intervenors would invoke the contempt process of the court. The suggestion is declined. In the first place, as the specific findings herein will reveal, the defendants in the greater number of the applications were warranted in their determinations. Further, for any abuse of administrative discretion or powers, an equity court has more fitting and effectual restraints and correctives.

But above all, it is a weak court that must

depend for its strength upon the threat of contempt.

CRITERIA

III. These criteria have been used by the defendant Board and Superintendent in passing upon the instant requests for admissions:

"1. Relation of residence location of the pupil with reference to schools, or school, applied for.

"2. State of enrollment conditions in the schools concerned in any case, or cases, under discussion.

"3. Academic achievement and mental capacity as these factors enter into conclusions on requests for entry or transfer.

"4. Factors involving the health and/or well-being of the applicant which may have a bearing on the request from him.

"5. Any factors which might affect the mental or emotional stability of the applicant so much as to become pertinent in placement determinations.

"6. Is the applicant a bona fide resident of the city and actually entitled to attend school here."

UNIFORMITY IN USE OF CRITERIA

IV. These criteria have been applied to all requests, of both white and Negro children, for entry into a school other than that in which the applicant had just been a pupil. The Assistant Superintendent goes over with each school principal the list of all new students entering that school and they review the names with these criteria in mind. There is no proof of mala fides on their part.

MENTAL TESTS

V. The mental examination given the pupils is customarily a group, not an individual, test. The form of the test is not something for the court; it is an administrative judgment to be made by the school officials. Certainly a test by groups cannot be declared unfair or unacceptable as a matter of law. This is confirmed when, as here, the same kind of test is utilized for all children, irrespective of their race.

SPECIFIC RESULTS OF CRITERIA

VI. On review of the administrative application of the criteria to the present intervenors, the court finds and concludes that:

1. Six-year-old pupil No. 1 applied for enrollment in the 1st grade at Ficklin, the school nearest his home. From the same neighborhood other Negro children were entered there last February. On the school tests he is reported as "not ready for first grade anywhere," his mental age as below 4 years, his I.Q. rating 0. The authorities place him in a "readiness class". There is no such group at Ficklin. The very nearest to him is at Houston School, but nine city blocks away, where he has been placed.

This administrative decision cannot be said to be without acceptable support. If there were some other six children, as the plaintiffs assert, in the 1st grade at Ficklin with an I. Q. comparable with No. 1's, and if I. Q. were the only measurement employed by the schools, his enrollment in Houston might indicate discrimination. But the School Board and Superintendent rely more on academic achievement than upon estimated mental capacity. When, as instantly, no past record is available, they must be allowed to use their knowledge and experience to judge of his achievement ability. As this court has previously held, the preference for actual accomplishment over I. Q. has the backing of reputable educationists. Therefore, it cannot be condemned as arbitrary or capricious. The plaintiffs' psychologists deem I. Q. to be the better standard because, they urge, it represents attainment potentiality; but this view does not prove the other untenable.

2. Rejected for the 1st grade of nearby Howard School, pupil No. 2 has been assigned to Lyles-Crouch, several miles from her residence. While her I. Q. is below normal, and well below the median for her grade at Howard, it is conceded that three white children upon this level, if not below, have been enrolled in this school. Not sustained by the evidence, the court must overrule her exclusion.

3. The circumstances of pupil 3 are almost identical with those of No. 2, and the ruling excluding her must also be overturned.

4. No. 4 qualifies both for Ficklin's 1st grade where he has applied, and for Houston's where he has been assigned. The School Board says they are equidistant from his house; his parents

say Ficklin is 62 paces closer. The court cannot interfere in so minor a distinction as this, even if it be true that the white children once occupying the same house attended Ficklin.

5. Ramsay School 1st grade was sought by pupil 5. He was put in Lyles-Crouch, two or more miles away. Ramsay is undoubtedly the closer to his home. In February, 1959, his sister was ordered entered in Ramsay or Patrick Henry nearby, but a brother and another sister were turned down on their petition to be moved to Henry from Lyles-Crouch. No. 5, on the School Board analysis, is comparatively classified in these words: "There is no other pupil in the grade applied for as low in I. Q. level as this boy." Again, "He is more adapted to a retarded class group than to a regular group." This, the court believes, in the knowledge and experience of the school officials is a reasonable ground for declining his request for Ramsay.

6. No evidential basis exists for disallowing the application of No. 6 for the third grade at Howard. The factors of "mental or emotional stability" do not warrant the Board's decision.

7. What has just been said of No. 6 must also be said of No. 7.

8. No. 8's application to enter grade 6 at Howard cannot be sustained. On the Board's assay he has an I. Q. of 84—dull normal. His achievement level is "4th grade 7 months," and only two children are at this level in Howard's 6th. Of these one has repeated two grades and is about to be transferred to a class for the emotionally disturbed. The other has "a better than average intellect" but has scored low because as a foreigner he is deficient in English.

9. As to pupil 9 the school officials report, "There is no student in the sixth grade at the Minnie Howard School who has as low an accomplishment level as this boy." He lives much closer to this school than to Lyles-Crouch, where he was placed, but the disqualification itself shows that the differentiation was not upon race. The refusal of the application cannot be disturbed.

10. With white children of the same or lower academic achievement, and considerably lower I. Q., attending Howard which is No. 10's school geographically, no sound foundation appears for declining him admission there. The contrary decision of the Board cannot stand.

11. "Only one child in the grade at Howard . . . has as low an average of achievement as" No. 11. It is, however, the nearest school. But the one comparable child is a repeater. Refusal of No. 11's request for Howard could not, then, be ascribed to race. A determination not to add another to the bottom of the class, when only one white has been so received, cannot be declared a discrimination for color. The Board's declination will not be upset.

12. Refusal of the request of No. 12 to enter Jefferson, in the 8th grade, is founded on the alleged incorrectness of the official records. The defendants say there is no record of her attendance in the second half of the 3rd grade or of any part of the 6th grade. But the answer is that the defendants allowed her to do so. Last session she was enrolled in the 7th grade without protest. She completed it successfully. Having a high I. Q., actual as well as comparative, the school test gives her a mental age of 13-5, a chronological age of 11-6 years. She was also turned down upon stability and emotional factors. Decision here must be reversed.

13. The defendants' administrative evaluations classify No. 13 thus: that his grade achievement of 4 years, 8 months is behind the level of Hammond High's 9th grade, which he seeks to enter, and there are only 2 other enrollees, out of 252, with as low an achievement level as he. The two are repeaters of the grade. He is certainly within the territorial area of Hammond. While it is a close case, the court cannot say in these circumstances the Board's rejection of him—while allowing two white repeaters to remain in this level—is solely based on race and color. The administrative determination is entitled to have the doubt resolved in its favor.

14, 15, 16 and 17. All of one family, Nos. 14, 15, 16 and 17 moved to Alexandria from Washington, D. C. in April, 1959. They live in the territory of the schools they seek. Nos. 15, 16 and 17 voluntarily sought Lyles-Crouch, then withdrew and applied for Ramsay. No. 14 did not apply to Hammond until the present session.

Nos. 14 and 15 are clearly entitled to be received in Hammond and Ramsay, respectively. The factor of stability-emotional cannot under the evidence prevail to bar them.

No. 16, if registered in Ramsay's 4th grade, as asked, would be behind the achievement level there by 2 years, 2 months. Only one child there now has an achievement level as low as No. 16—that child is a repeater. The determination not to increase this low level category would seem to be a substantive decision.

No. 17 would be 4 years behind the achievement level of the Ramsay 6th grade if his application were accepted there. No other child in that grade would have as low an achievement level. He would be lower than the lowest by almost a year. His rejection cannot be called unsound.

SUMMARY

The result is to order the admission of:

- (1) Judy Belk to the 1st grade of the Minnie Howard School;
- (2) Deborah A. Bradby to the 1st grade of the Minnie Howard School;
- (3) Vickie Belk to the 3rd grade of the Minnie Howard School;
- (4) Marie A. Bradby to the 4th grade of the Minnie Howard School;
- (5) James O. Bradby to the 7th grade of the Minnie Howard School;
- (6) Eva Ann Cooper to the 8th grade of Jefferson School;
- (7) Betty Lou Gaymon to the 11th grade of Hammond High School; and
- (8) Jo Ann Gaymon to the 1st grade of the Ramsay School: all effective at the commencement of the second semester, or its equivalent of the current school session.

The defendants' determinations upon the requests of the other intervenors will not be altered.

DIRECTIONS FOR ORDER

Counsel for the intervenors will within 10 days, first submitting it to opposing counsel for comment as to form, present an appropriate order upon these findings and conclusions. The order shall also direct the defendants in the future, upon rejecting an application for transfer or initial enrollment, to notify the applicant, his parent or guardian in writing within 10 days of such rejection with the reasons therefor.

EDUCATION

Public Schools—Washington

William PERRY et al., Appellants v. SCHOOL DISTRICT NO. 81, SPOKANE, Washington, Respondent, and Upper Columbia Mission Society of Seventh Day Adventists, Inc., a Washington Corporation, and International Religious Liberty Association, Appellants.

Supreme Court of Washington, En Banc, October 8, 1959, 344 P.2d 1036.

SUMMARY: Spokane, Washington, taxpayers brought an action in superior court to have the "released-time" program as authorized by school board resolution and carried out in local public schools declared unconstitutional. Under the program, early in each school year a representative from each religious group that wishes to participate therein comes to each school to tell the children of the availability of religious instruction and to distribute cards to be taken home so that parents may indicate a desire to have their children receive the instruction. The children whose parents so indicate are released one hour per week for off-campus religious instruction classes at no public expense, while the remainder of the children are kept occupied at school in school activities. A summary judgment by the trial court that the program is constitutional was appealed. The state supreme court overruled: (1) the contention, as not supported by the record, that the program disrupts the instruction of children remaining in the classrooms to their detriment in violation of constitutional equal protection guarantees; and (2) the contention that the program violates compulsory school attendance laws, because school officials are within their statutory authority to excuse students from the operation of those laws for "any . . . sufficient reason." However, it was held that the practice of permitting the distribution of the cards and making announcements relative to the program on school premises is a use of school facilities supported by public funds for the promotion of a religious program, and has the effect of influencing the pupils while assembled in the classrooms as a captive audience to participate in a religious program, in contravention of the state constitution. The judgment was affirmed subject to a remand of the cause for modification consistent with the supreme court's opinion.

HUNTER, Judge.

This appeal involves the constitutionality of the released-time program carried on in Spokane in school district No. 81.

The action was instituted by the plaintiffs, William Perry, Bud Cox, Kenneth Roberts and Ray Parringer. They, as taxpayers, sought to have the released-time program, being carried out in Spokane, declared unconstitutional. The Upper Columbia Mission Society of Seventh Day Adventists, Inc., and the International Religious Liberty Association were granted leave to file their complaint as plaintiffs in intervention.

[Findings of Fact]

No assignments of error have been made to the findings of fact and they therefore become the established facts of the case. Rule on Appeal 43, 34A Wash.2d 17, as amended, effective January 2, 1953; *Hector v. Martin*, 1958, 51 Wash.2d 707, 321 P.2d 555. The findings of fact show that, on September 28, 1938, the

school board by resolution authorized the release of public school children for one hour per week for religious education upon the written request of their parents. Since that date a released-time program has been in effect within school district No. 81, and since its inception the program has been primarily administered by the Spokane council of churches representing the following denominations: American Baptist, Disciples of Christ, Congregational, Covenant, Lutheran, Methodist, Episcopal, Presbyterian, and United Presbyterian. There is nothing in the board's resolution limiting the program to any particular church or religious faith. In recent years one parish of the Catholic church has participated in the program. The expense of the program is borne by the religious groups involved. No money out of the common school fund or tax funds is contributed to or received directly or indirectly by those instructing the religious classes, nor for incidental costs of books and supplies needed or used. The classrooms used for the religious instruction are located off the school grounds, usually in

a nearby church. The procedural aspect of the released-time program is carried out in the following manner.

[The Program's Procedural Aspects]

Early in the year, a representative from the religious group calls upon the principal of each individual school and provides a supply of cards upon which parents may indicate their desire to have their children attend the religious instruction. Depending upon the preference of the principal involved, the cards are distributed to the students either by the representative of the religious group or by the individual classroom instructors. In the distribution of these cards, the children are informed of the availability of the religious instruction and are requested to take the cards home to their parents. The Catholic parish involved distributes the request forms from the church, but there is no finding that they do not also distribute the cards in the public schools.

At the appointed hour for the religious instruction, those children whose parents have requested that their children receive the instruction, by signing and returning the request cards, are released from their regular classroom activities. They are met at the school by an escort provided by the religious group and are taken to the religious instruction classroom. At the end of the religious instruction, the children are returned to their public school classroom by the escort from the religious group.

The religious instruction period corresponds to a school period. In most instances this is from forty-five minutes to one hour, but not in excess of one hour. These religious instruction classes are held once a week, in some instances during all of the school term and in others during only a portion of the term. The children whose parents have not requested their release remain in the classroom where their public school activities continue. In most instances, where there are but few children remaining, the regular group instruction ceases, but the remaining children are kept occupied with several projects, additional individual help, or some other school activity, depending upon the discretion of the classroom teacher. The program is being carried out only in the elementary grades; all students are free to participate or not as their parents desire or request.

The school district, its directors, employees, and agents exercise no control or supervision over

the instructors or the material used in any of the religious instruction classes, nor over the scope of the instruction. No report is made by any instructor of the released-time program to the teacher or employee of the district with respect to whether or not a child who was released to participate in the program had actually attended the class. No record is kept by the district or its employees as to actual attendance at the religious instruction classes. The responsibility for attendance at such classes is left with the person who escorts the children for the particular religious group. The children receive no school credit for participation in the released-time program. The function of the defendant school district is to facilitate the distribution of the request cards and thereafter note which children are to be released.

[Action in the Trial Court]

The facts in the trial court were determined by the pleadings and depositions, and by requests for certain admissions of fact served on the defendant, pursuant to Rule of Pleading, Practice, and Procedure 36, 34A Wash.2d 99, effective January 2, 1951. The plaintiffs thereupon made a motion for summary judgment pursuant to Rule of Pleading, Practice, and Procedure 19, 34A Wash.2d 29, as amended, effective November 1, 1955. Both parties consented that the constitutionality of the released-time program should be determined in this manner. The trial court thereupon entered summary judgment holding that the released-time program was constitutional. The plaintiffs have appealed.

By their assignments of error, the appellants contend the released-time program maintained by the respondent school district is in contravention of the following provisions of the United States constitution, our state constitution, and certain statutory provisions of the state of Washington:

United States constitution amendment I:
 " * * Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

United States constitution, amendment XIV, § 1: " * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

[Washington Constitution]

Washington constitution, Art. I, § 11 (as amended by amendment 4): "Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person, or property, on account of religion; * * *. *No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment.* * * *" (Italics ours.)

Washington constitution, Art. IX, § 4: "Sectarian Control Or Influence Prohibited. All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control of influence."

RCW 28.02.040: "* * * All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

RCW 28.27.010: "All parents, * * shall cause such child to attend the public school of the district in which the child resides for the full time when the school is in session or to attend a private school for the same time."

"The superintendent of the schools of the district in which the child resides, or the county superintendent if there is no district superintendent, may excuse a child from such attendance if the child is physically or mentally unable to attend school, * * * or for any other sufficient reason. * *"

[Constitutional Prohibition Strictly Construed]

The released-time program in public schools is not a new question in other jurisdictions, but it is a question that has not been passed upon in this state. This court, however, has consistently strictly construed our state's constitutional prohibition against the use of public funds for any religious purpose, and has likewise so construed the constitutional mandate that our school supported by public funds shall be free from sectarian control or influence. See *State ex rel. Dearle v. Frazier*, 1918, 102 Wash. 369, 173 P. 35, L.R.A.1918F, 1056; *State ex rel. Clithero v. Showalter*, 1930, 159 Wash. 519, 293 P. 1000;

Mitchell v. Consolidated School Dist. No. 201, 1943, 17 Wash.2d 61, 135 P.2d 79, 146 A.L.R. 612; *Visser v. Nooksack Valley School Dist. No. 506*, 1949, 33 Wash.2d 699, 207 P.2d 198.

The precise question raised in the instant case was before the United States supreme court in *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649; and *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954. In the former the released-time program as practiced in the state of Illinois was held to be in violation of the first amendment to the United States constitution. In the latter, the released-time program as practiced in the state of New York was held not to be in contravention of any United States constitutional provisions. In *Gordon v. Board of Education*, 78 Cal.App.2d 464, 178 P.2d 488, 497, in commenting upon the wide practice of released-time programs in the states of this country, the court stated:

"The California Released School Time Religious Education Program authorized by section 8286 of the Education Code, is not new in the United States. Either by express statutory provisions, court decisions, rulings of the State Attorneys General or opinions of state boards of education or Chief State School Officers, forty states authorize the release of public school pupils for weekly religious education classes. And it is noteworthy that no appellate court of any state has held such programs unconstitutional. * *"

It is safe to say that the released-time program in itself has never been held to be in contravention of the doctrine of separation of church and state, nor of any state or Federal constitutional provisions; it is only the manner in which it has been practiced that has constituted a violation. Each case is determined by its own facts.

[The McCollum Case]

In the McCollum case, *supra*, the local board of education in Champaign, Illinois, participated in a released-time program wherein (1) religious training took place in school buildings and on school property; (2) the place for instruction was designated by school authorities; (3) pupils taking religious instruction were segregated by school authorities according to faiths; (4) school officials supervised and approved the religious teachers; (5) pupils were solicited in school buildings for religious instruction;

(6) registration cards were distributed by the school and in one case printed by the school.

[*The Zorach Case*]

In the released-time program as practiced in New York state (*Zorach v. Clauson*, supra), none of the above factors was present; (1) there was no supervision or approval of religious teachers and no solicitation of pupils or distribution of cards; (2) the religious instruction was required to be held outside the school buildings and grounds; (3) no announcement of any kind was permitted in the public schools relative to the program, neither was any comment allowed by any principal or teacher on the attendance or non-attendance of any pupil released for religious instruction. All that the school did besides excusing the pupil was to keep a record, which was not available for any other purpose, in order to see that the excuses were not taken advantage of and that the school was not deceived, being the same procedure the school would follow in respect to absence for any other reason. Justice William O. Douglas, in the majority opinion in the *Zorach* case, supra, compares the released-time programs under the *Zorach* and *McCollum* cases, supra, as follows:

"New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.

"This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike [*People of State of Illinois ex rel.*] *McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. [649], which involved a 'released time' program from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held

that the program violated the First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion or prohibiting its free exercise." [343 U.S. 306, 72 S.Ct. 681]

The arguments of the appellants in the *Zorach* case, supra, are similar and in essence do not differ from those advanced by the appellants in the instant case. Quoting further from the *Zorach* case, the court said:

"* * * Their argument, stated elaborately in various ways, reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this 'released time' program like the one in the *McCollum* case, would be futile and ineffective. * * *

[*Zorach Case Quoted*]

We quote extensively from the reasoning of the *Zorach* case, supra, in view of its applicability here:

"* * * our problem reduces itself to whether New York by this system has either prohibited the 'free exercise' of religion or has made a law 'respecting an establishment of religion' within the meaning of the First Amendment.

"It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

"There is a suggestion that the system involves the use of a coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose

parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented. Hence we put aside that claim of coercion both as respects the 'free exercise' of religion and 'an establishment of religion' within the meaning of the First Amendment.

"Moreover, apart from that claim of coercion, we do not see how New York by this type of 'released time' program has made a law respecting an establishment of religion within the meaning of the First Amendment. There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. See *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711; [*People of State of Illinois ex rel.*] *McCullum v. Board of Education*, supra. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our

public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'

"We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

* * * * *

"* * * The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree. See [*People of State of Illinois ex rel.*] *McCullum v. Board of Education*, supra, 333 U.S. at page 231, 68 S.Ct. at page 475.

"In the *McCullum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCullum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people.

We cannot read into the Bill of Rights such a philosophy of hostility to religion."

[Zorach Reasoning Sound]

The reasoning of the Zorach case, *supra*, is sound and reflects the reasoning of the state courts which have passed upon the same question, except that of the state of Illinois to a limited degree in the McCollum case, *supra*. It answers the contentions of the appellants in the instant case as to the violation of the United States constitutional provisions by the released-time program practiced in Spokane, as authorized by the respondent in so far as the facts of the Zorach case are here applicable.

The significant difference in the facts of the Zorach case and the instant case can be at once observed and that is the practice permitted by the respondent of the distribution of the cards and the making of announcements by the representatives of religious groups or school instructors relative to the program in the classrooms or on school premises. This practice was among those present in the McCollum case, and which was absent in the Zorach case. Moreover, this is a use of school facilities supported by public funds for the promotion of a religious program, which contravenes Art. I, § 11 of our state constitution. State ex rel. Dearle v. Frazier, *supra*; State ex rel. Clithero v. Showalter, *supra*; Mitchell v. Consolidated School Dist. No. 201, *supra*; Visser v. Nooksack Valley School Dist. No. 506, *supra*.

This practice has the further effect of influencing the pupils, while assembled in the classrooms, as a "captive audience" to participate in a religious program, contrary to the express provisions of Art. IX, § 4 of our state constitution:

"* * * All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." (Italics ours).

The appellants contend that the released-time program permitted by the respondent disrupts the instruction of the children remaining in the classrooms, to their detriment, and is a violation of the equal-protection clause of the state constitution and the United States constitution. This contention is not supported by the record. To the contrary, the children remaining in school are assigned to special projects and receive the

advantage of individual instruction during the released-time periods.

[Attendance Laws not Violated]

The appellants further contend the compulsory school attendance laws are being violated by the released-time program. We disagree. The superintendent of schools is vested with statutory discretion to excuse pupils from the operation of the enactment for reasons recited in the statute and for "any other sufficient reason." The release of children from school upon the parent's request for religious instruction constitutes an exercise of this statutory authority.

Our state constitution like that of the United States and every state in the Union, by the language used, indicates the framers were men of deep religious beliefs and convictions, recognizing a profound reverence for religion and its influence in all human affairs essential to the well-being of the community. See *Gordon v. Board of Education*, *supra* (concurring opinion). Our Preamble reads as follows:

"We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain their constitution." (Italics ours).

It was never the intention that our constitution should be construed in any manner indicating any hostility toward religion. Instead, the safeguards and limitations were for the preservation of those rights. No limitations of the constitution are contravened by the respondent school district permitting a released-time program in its schools, if practiced in a manner not inconsistent with the constitutional limitations as outlined in this opinion.

[Unconstitutional Practices]

We hold the following practice in the released-time program, permitted by the respondent, to be in contravention of Art. I, § 11 (as amended) and Art. IX, § 4 of the state constitution, i.e., the distribution of cards in public schools, or the making of announcements or explanations for the purpose of obtaining the parents' consent for their children's participation in the released-time program, by representatives of religious groups or instructors in the schools.

The judgment of the trial court is affirmed subject to a remand of the cause for modification consistent with this opinion. It is so ordered.

WEAVER, C. J., and MALLERY, HILL, DONWORTH, FINLEY, ROSELLINI, OTT, and FOSTER, JJ., concur.

WEAVER, Chief Justice (concurring in the result).

I have signed the foregoing opinion. I wish to point out, however, that Art. IX, § 4, of the Washington constitution, which provides

"Sectarian Control Or Influence Prohibited. All schools maintained or supported wholly or in part by the public funds shall

be forever free from sectarian control or influence."

is more proscriptive than the other constitutional provisions discussed in the opinion.

That it is so is the result of deliberate action by the constitutional convention of 1899. It appears from the journal of the Washington State Constitutional Convention, 1889, p. 335 (unpublished; the original is in the office of the Secretary of State), that J. Z. Moore, a member of the convention and a lawyer from Spokane, moved to strike the words "or influence" from the section. The motion lost 39 to 11.

EDUCATION

Private Schools—Tennessee

STATE of Tennessee ex rel. A. V. SLOAN, District Attorney General v. HIGHLANDER FOLK SCHOOL.

Circuit Court, Grundy County, Tennessee, March 7, 1960, No. 90.

SUMMARY: The state of Tennessee, by a district attorney general, in a circuit court proceeding charged that a private adult educational institution located in Grundy County was being operated as a public nuisance and in non-conformity to its charter, and petitioned that the nuisance be abated, the charter revoked, and the corporation dissolved. On a preliminary hearing as to the alleged nuisance, the court found that the defendant had sold beer in the administrative building and ordered it padlocked. On the final hearing, a jury found that the school had been operated for the personal gain of its president. Defendant admitted its educational activities to be racially integrated contrary to state segregation statutes, but insisted that those statutes had been rendered unconstitutional by United States Supreme Court decisions. The court held that the operation of the school for (1) its president's personal gain contrary to charter, and (2) in violation of state criminal laws by permitting the sale of beer on its property without a license, and by allowing racial integration in classes at the school, constituted such misuse of defendant's charter as to work a forfeiture thereof. It further held that the Supreme Court's decision in the *School Segregation Cases* concerning public education did not have the effect of rendering Tennessee's school segregation statutes unconstitutional as applied to private schools. The defendant's charter was revoked, and defendant and its officers were enjoined from disposing of assets. The cause was left open for further orders as deemed necessary, including the appointment of a receiver. The court's final order and opinion follow.

CHATTIN, Judge.

This suit was instituted by the State through its District Attorney General seeking ultimately to have the Charter of defendant revoked and the corporation dissolved.

The petition charges that the defendant was

engaging and maintaining a place where certain transactions were permitted to be carried on constituting a nuisance under the State's nuisance act. The petition also charged that defendant was in violation of the State's quo warrant statutes. The petition prayed that the

nuisance be abated and that the Charter of the corporation be revoked.

The final hearing of this cause was before a jury of eleven men and one lady of Grundy County.

One issue of fact was submitted to the jury, to wit: "Has Highlander Folk School been operated for the personal gain of Myles Horton?"

(The question of the sale of beer was a settled issue, or, in other words, the defendant's attorney stated in open Court that the findings of the Court in the September hearing were conclusive.)

(The question of integration at defendant's school was admitted by defendant but insisted that the segregation laws of this state had been held unconstitutional by the Supreme Court of the United States.)

The questions to be decided by the Court are:

Does the practice of integration at defendant's institution authorize a forfeiture and revocation of its charter?

(Discussion of first two questions omitted)

Title 49, Section 3701 of the Tennessee Code Annotated provides:

"It shall be unlawful for any school, academy, college or other place of learning to allow whites and colored persons to attend the same school, academy, college or other place of learning."

Defendant admits that it practices integration and that it is a private institution. That it is an adult educational institution was proven by a preponderance of the evidence at the trial.

The defendant insists that the Supreme Court of the United States in the case of *Brown v. The Board of Education*, 347 U. S. 483 held that the foregoing statute was held unconstitutional. Defendant further insists that the Fourteenth Amendment to the Constitution of the United States forbids state action based on race.

The Supreme Court held as follows in the *Brown* case: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place."

The relator insists that this holding does not render the statute unconstitutional as to private schools.

"Statutes may be unconstitutional and void as to their application to a part of their subject

matter and valid as to other parts, or, to state the problem more concretely, they may be constitutional in operation with respect to some persons and states of fact and unconstitutional as to others." 11 Am. Jur. Section 163, page 857.

"A law may be unconstitutional as far as it affects natural persons, and yet as to corporations it may be valid." 11 Am. Jur. Section 163, page 858.

In the case of *Roy Goward College Trusteeship* 391 PA. 434, it was held that a school created by will of a testator and to be operated for white males only are entitled to the protection of the law, and to enforce the same is not discriminatory state action.

"It is equally well settled that the liberty guaranteed under this amendment against deprivation without due process of law is a liberty of natural, and not artificial, persons." 11 Am. Jur. Section 329, page 1134.

"Corporation is an artificial being, invisible, intangible and existing only in contemplation of law." 21 Tenn. App. 463.

This Court is of the opinion that the segregation laws of the state as applied to private schools are constitutional and valid.

The Court is of the further opinion that in view of the findings of the jury to the effect that Myles Horton, the President of the defendant corporation, has been operating the school for his own personal gain is such a misuse of defendant's charter as works a forfeiture of same.

The Court is of the further opinion that the defendant having violated the criminal laws of the state in that it has permitted the sale of beer to be carried on upon its property without a permit or license and permitting integration in its school works a forfeiture of its charter, the defendant having accepted its charter with the condition that "a violation of any of the provisions of this charter shall subject the corporation into dissolution at the insistence of the State."

The Court further finds that the deed to Horton from defendant is void for the reason the charter provides that no dividends or profits may be divided among its members.

Relator insists that upon revocation of defendant's charter that the property escheats to the State. However, the Court is of the opinion Title 23, Section 2818, Tennessee Code Annotated, applies. Therefore, a receiver will be appointed by the Court to wind up defendant's affairs.

Defendant may have 30 days from entry of order to file a motion for a new trial.

Chester C. Chattin, Judge

FINAL ORDER

CHATTIN, J.

This cause came on to be heard on the 7th day of March, 1960, before the Honorable Chester C. Chattin, holding the Circuit Court for the 18th Judicial Circuit of Tennessee, for the County of Grundy, at Altamont, upon motion of the Attorneys for the defendant made in Open Court, and pursuant to permission of the Court, and by agreement of Attorneys for the Relator that the Order of the Court heretofore made and entered on February 24, 1960, be vacated, and it appearing to the Court that said motion was well taken, it is ordered by the Court that said Order be vacated in all things.

IT IS NOW ORDERED, ADJUDGED AND DECREED by the Court that the final order be and is hereby entered as follows:

This cause came on for final hearing before the Honorable Chester C. Chattin, Circuit Judge, at Altamont, Tennessee, on the dates of November 3rd, 4th, and 5th, 1959, upon the original bill of A. F. Sloan, Relator, as amended, the demurrer and answer of the defendants Highlander Folk School, et al, and the whole record in the cause, including the evidence introduced upon the interlocutory hearing for temporary injunction conducted on the dates of September 14th, 15th, and 16th, 1959, and the interlocutory orders and decrees entered pursuant thereto.

When the case was called for hearing, attorneys for Relator moved the Court that the original bill, as amended, be further amended by striking therefrom all prayers for injunctive relief of any kind, and which motion the Court did then, and does now, sustain, and it is ORDERED that the original bill now stands thus amended.

Attorneys for defendants then called up the demurrer of defendants for hearing, whereupon the Court did then, and does now, rule and hold that the last amendment to the original bill fully met and preempted the force of the demurrer and, it is ORDERED that said demurrer be, and the same is hereby, overruled, in its entirety. To which action of the Court the defendants excepted.

Thereupon, the attorneys for the parties announced ready for trial, upon the merits and the Court thereupon caused a jury of good and lawful citizens to be selected by the parties and

empanelled and sworn to try the issues of fact submitted to them by the Court, said jury being composed as follows: Haskel Medley, Tommy Smartt, Freddie Hasselbrook, Oris Sain, Colene Meeks, Banks Thompson, Douglas Partin, Noah White, James Walker, Earl Hargis, Paul Cooke and Johnny Layne.

Selection of the jury was over the objection of the defendants on the grounds that such selection was not in accordance with TCA 23-2815, and other applicable law, which objection the Court overruled, and to which action of the Court the defendants excepted.

At the close of plaintiff's proof, defendant moved to have the issues withdrawn from the jury, and the case dismissed, which motion the Court overruled, and to which action the defendants excepted. At the conclusion of all the proof, the defendant again moved that the issues be withdrawn from the jury, and the bill dismissed, and that a verdict be directed for defendant, and that there was no proper issue to submit to a jury. The Court overruled defendants motions, to which action of the Court the defendant excepted.

The pleadings then were read to the Court and jury, and evidence was introduced by the respective parties, and, after argument of attorneys for the parties, the Court submitted the following issue of fact to the jury for determination: Has Highlander Folk School been operated for the personal gain of Myles Horton? After receiving the charge of the Court, the jury retired to consider of their verdict and, after due deliberation, returned in open Court and announced that they answered the issue submitted to them in the affirmative. The Court accepted the verdict and discharged the jury.

The Court, thereupon, took the case as a whole under advisement, and, after receiving briefs of attorneys for the respective parties, and, after a full consideration thereof, thereafter filed memorandum opinion, which is ordered to be made a part of the record by incorporation herein, and which is in words and figures as follows:

(Here Clerk will copy opinion of Court at length). [*Opinion Printed, supra, p. 91*]

The Court concurs with the jury in its finding of fact as aforesaid, and also adopts the foregoing opinion as a full finding of facts based upon the record and as a statement of the conclusions of law thereto applicable.

In conformity with the foregoing opinion, the verdict of the jury, IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that:

1. The deed of Highlander Folk School to Myles Horton, dated August 7th, 1957, and registered in the Register's Office of Grundy County, Tennessee, in Deed Book, page 438-439, is void and of no force or effect; and that said Highlander Folk School remains vested with the legal title to all of the lands and properties described in said void deed.

2. The Charter of Incorporation issued by the State of Tennessee to Highlander Folk School, upon application of incorporators, Myles Horton, Elizabeth Hawes, James Dombrowski, Rupert Hampton and Malcolm Chisholm, under date of October 20, 1934, and of record in the office of the Secretary of State, Nashville, Tennessee, in Charter Book O-12-P-146, and of record in the Register's Office of Grundy County, Tennessee, in Deed Book Misc., page 18, be, and the same is hereby decreed forfeited and revoked and in all things cancelled and hereafter null and void.

3. The defendant Highlander Folk School, and all its corporate officers, trustees, or directors, members, agents and employees of the same are strictly enjoined and required to file with the Clerk of said Court, within 15 days from the entry of this order, a complete inventory of all assets, real, personal and mixed, including all records of assets, and records of places of depository where such assets are kept and located.

The Highlander Folk School, and all of its corporate officers, trustees, or directors, are

further strictly enjoined and prohibited from transferring, conveying, giving, delivering, pledging, hypothecating, surrendering, cancelling, or transmitting any assets of Highlander Folk School, to any person, firm, organization or entity; and likewise they are enjoined from concealing or suppressing the knowledge of the assets and place of keeping of any assets. This injunction shall be and remain in effect pending the final adjudication of this cause throughout procedures upon appeal, if taken and pursued. However, such injunction against disbursement of funds or assets of the defendant shall not extend to ordinary and necessary expenses, such as salaries, postage, phones, or as to the expenses of the general operation of the adult educational institution, as such funds were expended by said defendant prior to the entry of this order. Provided the injunction shall prohibit incumbrance or alienation of any of the capital assets of the defendant.

4. All costs of the cause are adjudged against defendants and for collection of which execution may issue.

5. The cause shall remain open for entry of all orders of reference that may appear hereafter to the Court necessary as to the identity and interests of persons claimant to the moneys in the hands of the defendants, and for such other and further orders as the Court may deem proper, including the appointment of a Receiver, if necessary.

Either party may have thirty days from and after date of entry of this order within which to prepare and file motion for new trial or rehearing.

Entered this 7th day of March, 1960.

EDUCATION

Private Schools—Washington

STATE of Washington, on the Relation of Shoreline School District No. 412 v. SUPERIOR COURT of the State of Washington FOR KING COUNTY, JUVENILE COURT, The Honorable Raymond Royal, Judge.

Supreme Court of Washington, En Banc, December 3, 1959, 346 P.2d 999.

SUMMARY: After a girl had been withdrawn from a King County, Washington, public school, the school authorities filed a petition in a state juvenile court alleging that she was a juvenile

delinquent for failure to comply with the compulsory school attendance law, and that her parents were contributing to her delinquency. The court held that the instruction in regular public school subjects being given to the girl at home by her mother did not constitute a private school within the terms of the school attendance law; and tenets of the family's church forbidding eating meat, listening to music, and dancing, and being present where such is done, were held not to justify a violation of the law. The girl therefore being found delinquent and her parents to be contributing thereto, she was adjudicated in 1955 a dependent child ward of the court but permitted to remain in her parents' physical custody, conditioned upon the parents providing a method for her education in conformity with state law. Upon the parents' continued disregard of the judgment, school authorities petitioned the court in 1957 for a review of its 1955 order and for compliance by the parents with the attendance law. With a different judge sitting, the court then found that she was still a dependent child ward of the court; but it also found that, because the legislature had not set standards for private schools and because the mother's instruction had improved to the extent that the girl was receiving book learning comparable to that in the public schools, she was attending a private school as contemplated by law. On certiorari, the state supreme court, by a 5 to 4 vote, affirmed the decision that the girl was still a dependent child and would remain a ward of juvenile court until the dependency is removed by attendance at a public or qualified private school, but reversed as inconsistent the holding that the home "school" is a method of education conforming with state law. The court held that there are statutory standards governing the operation of private schools in the state, including requirements that teachers therein must be qualified and hold teaching certificates and that such schools must make annual reports to county and state superintendents, which had not been met here so as to make the home "school" an "approved private school" within the attendance law. The court also held that although the freedom to believe is absolute, religious beliefs are not legal justification for violation of positive law.

OTT, Judge.

William and Maude Wold are husband and wife, and have been residents of the state of Washington since August, 1952. Alta Lee Wold, their daughter, was born June 6, 1945. Prior to March 14, 1955, she was regularly enrolled as a grade school student at the Ronald public school in Shoreline school district No. 412 in King county. On that date, her parents withdrew her from the fourth grade. After several demands were made upon the parents by the truant officer of the school district that Alta Lee attend a public or private school, as required by Laws of 1909, chapter 97, title 3, subchapter 16, p. 364 et seq., a petition was filed in the juvenile court for King county which alleged that Alta Lee Wold was a delinquent child, because of her violation of the compulsory school attendance law of this state, and that William and Maude Wold, her parents, were contributing to her delinquency.

[Admissions and Defenses]

At the hearing upon the petition, the parents admitted that Alta Lee had not been attending public school, and that she had not been excused

from attendance by any school authority. Their defense was that Alta Lee's mother had graduated from a Colorado high school in 1937; that Alta Lee was being taught the regular public grade school subjects by her mother in their home, and that this constituted a private school. A further defense was that they were members of the Seventh Elect Church In Spiritual Israel; that eating meat, fish or fowl, listening to music, and dancing were forbidden by the tenets of their church, and that, to be present where meat, fish or fowl was served or music played violated their religious belief.

After considering the evidence, the juvenile court found that the "school" Alta Lee was attending did not constitute a private school as contemplated by law; that, although their church tenets were violated by public school attendance, this was not a defense to violation of the compulsory school attendance law; that Alta Lee was a dependent and delinquent child, and that the parents, William and Maude Wold, were contributing to her dependency and delinquency.

August 8, 1955, the court adjudicated Alta Lee to be a dependent child and a ward of the

juvenile court, but permitted her to remain in the physical custody of her parents, conditioned upon her parents' providing, prior to September 1, 1955, a method for her education in conformity with state law.

September 14, 1955, the parents failed to appear and answer a petition relative to their compliance with the August 8, 1955, judgment, and, September 19, 1955, the court entered an order continuing the cause "Subject to Call."

[Continued Disregard]

The Wolds continued to disregard the judgment of the court and, on May 13, 1957, Shoreline school district No. 412 again petitioned the court for a review of the August 8, 1955, dependency order and for compliance, on the part of the parents and Alta Lee Wold, with the compulsory school attendance law.

The cause was heard before another trial judge, as the former judge voluntarily disqualified himself. Further evidence was introduced. At the close of the trial, the court found that "All of the facts and circumstances which compelled the court to assume jurisdiction over Alta Lee Wold on August 8, 1955, still exist," and that Alta Lee was still a dependent child and a ward of the court.

The court further found that the mother's teaching methods had improved in the two and one-half years she had been maintaining the home school; that the legislature had not provided standards for private schools, and that, since Alta Lee was receiving a book learning comparable to that of the public schools, she was attending a private school as contemplated by law.

Following the entry of judgment, the district was granted a review in this court by certiorari.

The principal assignment of error relates to the court's finding that the Wolds' home school constituted a qualified private school as contemplated by law.

[Findings Are Inconsistent]

We agree with relator's contention that the court's findings are inconsistent. It found that Alta Lee Wold was not attending a public or private school, as provided by law, and was therefore a dependent child. After so finding, it then found that the home school which she was attending, and which caused her to be adjudicated a dependent child, was a qualified private

school. In other words, the juvenile court obtained jurisdiction of Alta Lee Wold and made her a ward of the court because the court found that she was not attending a qualified private school, as contemplated by law. After obtaining jurisdiction of Alta Lee on this basis, the court then found that the welfare of its ward would best be served by her attending the same unqualified school because its method of education was "in conformity with the laws of this state."

The juvenile court's decision is inconsistent with *State v. Counort*, 1912, 69 Wash. 361, 124 P. 910, 41 L.R.A., N.S., 95 (to which decision we adhere), wherein this court held that a father teaching his children at home was doing so in violation of the compulsory school attendance law. In the cited case, this court said [69 Wash. at page 363, 123 P. at page 911]:

"... We do not think that the giving of instruction by a parent to a child, conceding the competency of the parent to fully instruct the child in all that is taught in the public schools, is within the meaning of the law 'to attend a private school.' Such a requirement means more than home instruction. It means the same character of school as the public school, a regular, organized and existing institution, making a business of instructing children of school age in the required studies and for the full time required by the laws of this state. The only difference between the two schools is the nature of the institution. One is a public institution, organized and maintained as one of the institutions of the state. The other is a private institution, organized and maintained by private individuals or corporations. There may be a difference in institution and government, but the purpose and end of both public and private schools must be the same—the education of children of school age. The parent who teaches his children at home, whatever be his reason for desiring to do so, does not maintain such a school. Undoubtedly a private school may be maintained in a private home in which the children of the instructor may be pupils. This provision of the law is not to be determined by the place where the school is maintained, nor the individuality or number of the pupils who attend it. It is to be determined by the purpose, intent and character of the endeavor."

[Constitutional and Statutory Provisions]

Article IX, § 1, of our state constitution, provides that "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, * * *." The legislature, in compliance with this constitutional mandate, provided for compulsory school attendance for all children between the ages of eight and sixteen years (unless excused from attendance for reasons not here material) at either a public or private school. Laws of 1909, chapter 97, subchapter 16, p. 364 et seq.

In order that school attendance be assured at either a public or private school, the legislature required that a census of all school children in each district be furnished to school authorities. All teachers are required to report all cases of truancy. Laws of 1909, chapter 97, subchapter 16, § 6, p. 367. The legislature authorized the attendance officer of the district to investigate school attendance of all children between the ages of eight and fifteen years, and to institute proceedings against violators of the compulsory school attendance law. Laws of 1909, chapter 97, subchapter 16, § 4, p. 366.

From the cited sections of the law, it is apparent that the legislature, in conformity with the constitutional mandate, required compulsory school attendance of all children between the ages of eight and sixteen years (with certain exceptions not here material) in either a public or qualified private school, and vested authority in designated officers to enforce this law.

[An Unsupported Finding]

Although the trial court found that there are no legislative standards governing private schools in this state, such a conclusion is not supported by law. A school is an institution consisting of a teacher and pupils, irrespective of age, gathered together for instruction in any branch of learning. *Weisse v. Board of Education of City of New York*, 1941, 178 Misc. 118, 32 N.Y.S.2d 258; *Board of Education of City School District of City of Cleveland v. Ferguson*, 1941, 68 Ohio App. 514, 39 N.E.2d 196. The three essential elements of a school are (1) the teacher, (2) the pupil or pupils, and (3) the place or institution. If the alleged school has no teacher, then it does not qualify as a school. There is one standard which the legislature made applicable to all schools, both public and private, and that standard is that the teacher

must be qualified to teach and hold a teaching certificate. Laws of 1909, chapter 97, subchapter 4, Art. VII, § 1, p. 306, provides:

"No person shall be accounted as a qualified teacher within the meaning of the school law, who is not the holder of a valid teacher's certificate or diploma issued by lawful authority of this state."

The Wolds had the place and the pupil, but not a teacher qualified to teach in the state of Washington. Their alleged private school did not legally qualify as such.

[An "Approved Private School"?)

The legislature granted to the county or district superintendent of schools the power to excuse one who was not attending public school from the penalties of the compulsory school attendance act, provided such child was attending an "approved private school." Laws of 1909, chapter 97, subchapter 16, § 1, p. 364, provides:

"All parents, guardians and other persons in this state having or who may hereafter have immediate custody of any child between eight and fifteen years of age (being between the eighth and fifteenth birthdays), or of any child between fifteen and sixteen years of age (being between the fifteenth and sixteenth birthdays) not regularly and lawfully engaged in some useful and remunerative occupation, shall cause such child to attend the public school of the district, in which the child resides, for the full time when such school may be in session or to attend a private school for the same time, unless the superintendent of the schools of the district in which the child resides, if there be such a superintendent, and in all other cases the county superintendents of common schools, shall have excused such child from such attendance because the child is physically or mentally unable to attend school or has already attained a reasonable proficiency in the branches required by law to be taught in the first eight grades of the public schools of this state as provided by the course of study of such school, or for some other sufficient reason. Proof of absence from public schools or approved private school

shall be *prima facie* evidence of a violation of this section." (Italics ours.)

[Report Requirements]

The legislature further required persons who were allegedly maintaining a private school to report annually to the county superintendent of schools. Laws of 1933, chapter 28, § 14, p. 172, provides:

"It shall be the duty of the administrative or executive authority of every private school in this state to report to the county superintendent of schools on or before the 30th day of June in each year, on a blank to be furnished, such information as may be required by the superintendent of public instruction, to make complete the records of education work pertaining to all children residing within the state."

Private schools must also report annually to the state superintendent of public instruction. Laws of 1909, chapter 97, title 1, subchapter 2, § 3, pp. 231, 233, provides:

"The powers and duties of the Superintendent of Public Instruction shall be: * * *

"Tenth. To require annually, on or before the 15th day of August, of the president, manager, or principal of every educational institution in this state, a report of such facts arranged in such form as he may prescribe, and he shall furnish blanks for such reports; and it is hereby made the duty of every president, manager or principal, to fill up and return such blanks within such time as the Superintendent of Public Instruction shall direct."

Although the legislature did not expressly provide that *all* of the legislative standards for a public common school must be maintained by a private school in order to qualify as such, it is reasonable to assume that the legislature intended that the one to whom it had delegated the power and authority to determine whether a child was attending a *qualified* private school would be guided in that decision by the minimum standards required by the legislature for a public common school. For example, Laws of 1909, chapter 97, title I, subchapter 1, § 2, p. 230; Laws of 1909, chapter 97, title III, subchapter 1, § 2, p. 262; Laws of 1909, chapter 97, title III, subchapter 4, art. 2, § 3, p. 286, as

amended by Laws of 1915, chapter 71, § 1, p. 246, Laws of 1919, chapter 90, § 4, p. 210, and Laws of 1955, chapter 8, § 1, p. 10; Laws of 1919, chapter 89, § 1, p. 205; Laws of 1912, chapter 56, p. 171, as amended by Laws of 1939, chapter 21, p. 51, and Laws of 1955, chapter 20, § 3, p. 159; Laws of 1923, chapter 76, p. 236; Laws of 1925, Ex.Sess., chapter 134, p. 337; Laws of 1941, chapter 203, § 1, p. 597.

Laws of 1933, chapter 28, § 14, p. 172, *supra*, requires reports by private schools to the county superintendent which are to contain such information as is required "to make complete the records of education work pertaining to *all* children residing within the state." (Italics ours.) The information contained on these forms, relative to the standards of the school, gives the superintendent the information needed to exercise his discretion as to whether or not the alleged school in fact *qualifies* as such, and, hence, whether children attending it may be excused from attendance at public school. Under the compulsory school attendance law, the legislature delegated to the district or county superintendent the authority to determine the minimum standards for a private school, in order that, in the exercise of his discretion, attendance at a qualified private school may be approved.

["Private School" Deficiencies]

In the instant case, the Wolds' alleged private school did not have a qualified teacher. The Wolds did not report that their daughter was attending a private school, nor did they attempt in any manner to qualify their alleged school as a private school with the person whose duty it was to exercise his discretion in granting the waiver to students of public school attendance.

We find no merit in the contention of the Wolds that they are excused from the penalties of the compulsory school attendance law because school attendance is repugnant to their religion. *Commonwealth v. Renfrew*, 1955, 332 Mass. 492, 126 N.E.2d 109; *Commonwealth v. Smoker*, 1955, 177 Pa.Super. 435, 110 A.2d 740; *Commonwealth v. Beiler*, 1951, 168 Pa.Super. 462, 79 A.2d 134; *People v. Donner*, 1951, 302 N.Y. 857, 100 N.E.2d 48; *People on Complaint of Shapiro v. Dorin*, 1950, 199 Misc. 643, 99 N.Y.S.2d 830; *Rice v. Commonwealth*, 1948, 188 Va. 224, 49 S.E.2d 342, 3 A.L.R.2d 1392.

Although the freedom to believe remains absolute, religious beliefs, whatever they may be, are not a legal justification for violation of positive law. See *State ex rel. Holcomb v. Armstrong*, 1952, 39 Wash.2d 860, 239 P.2d 545.

[Decision Affirmed and Reversed]

The judgment of the trial court is affirmed in the following particulars: Alta Lee Wold is a dependent child because she is in violation of the compulsory school attendance act, and will remain a ward of the court until such time as she is purged of dependency by attendance at either a public or qualified private school.

The judgment is reversed as to that portion thereof which adjudicates the Wold home school to be a method of education that conforms with state law. The cause is remanded with instructions to enter judgment in accordance with the views herein expressed. Neither party will recover costs.

WEAVER, C. J., and MALLERY, DON-WORTH and FOSTER, JJ., concur.

Dissent

HUNTER, Judge (dissenting).

This is not an action between the school district and the parents, as indicated in the majority opinion. In August 1955, Alta Lee Wold was adjudicated to be a ward of the juvenile court, consequently the parents no longer have control over this minor child; therefore this review is strictly a controversy between the school district and the juvenile court.

The trial court found that the minor child was receiving education in the home equivalent to the standards maintained in the public schools; that the welfare of the child would best be served by continuing her education in the home, in the manner which the parents are now providing. The findings and judgment provided in part:

[Findings and Judgment]

"Presently, a full school curriculum has been established in the Wold residence. The curriculum (save only for those subjects which are inconsistent with the Wolds' religious beliefs) is patterned after that fol-

lowed for the particular grade level in their school district. Regular class periods on various subjects are held at regularly scheduled hours each day, five days a week, for a full school year, the same as maintained in the school district in which the children reside. Full and complete attendance records are kept. The books and materials used compare favorably with those employed in the public school district. The teaching method used by Mrs. Wold compares favorably with those employed by fully accredited teachers in the school district. In many respects the results obtained by this method of education, insofar as Alta Lee Wold is concerned, is equal to that of a superior child of her grade level in the public schools of her school district. The method of education in the Wold residence is equal, if not superior, to the standards maintained in many of the public school districts of the State of Washington."

"The Wold home, save for the educational factor, is completely normal in every respect. The Wold children live a completely normal life and are well cared for and given every advantage possible by their parents. The entire family sincerely believes in the teachings of their church and does its utmost to live up to their religious beliefs."

The court concluded in part:

"In accordance with the above, it is the conclusion of this court that at the present time at the present grade level Alta Lee Wold is being furnished with a method of education in conformity with the laws of this state and that the welfare of said child will best be served by not revoking the order of August 8, 1955." (Italics mine.)

Judgment was entered as follows:

"* * * that Alta Lee Wold is now and will remain a ward of the court in temporary custody of her parents, Maude Wold and William Wold, subject to the probationary supervision of an officer of the juvenile court and subject to the further order of the court upon the condition that said parents shall continue to provide the said child a method for the education of said child which conforms to the laws of the State of Washington." (Italics mine.)

The school district has appealed contending the juvenile court erroneously determined that the instruction of the Wold child in the home is equivalent to a private school.

[The Issue Confused]

This contention is a confusion of the issue resulting from the finding of the juvenile court which was, in effect, that the education of the minor in the home was equivalent to the education she would receive in a private school. This finding was not necessary for the determination of the real issue before the court, that issue being what was best for the welfare of this particular child. The juvenile court did find it was for the welfare of this particular child that she continue to receive her education in the home, and that she remain under the continued probationary supervision of the juvenile court.

The school district takes the position that the education furnished the Wold child in the home is not equivalent to a private school; that the compulsory school attendance law, RCW 28.27.010, has been violated and the juvenile court has exceeded its jurisdiction in failing to comply with this statute. This completely misses the ultimate issue as to what is best for the welfare of the child under all of the circumstances of this case. This minor, having been determined a dependent and delinquent child, is clearly within the jurisdiction of the juvenile court which may enter any order for the promotion of the welfare of such a child.

RCW 13.04.090 of the juvenile act provides:

"* * * After acquiring jurisdiction over any child, the court shall have power to make an order with respect to the custody, care or control of such child, or *any order, which in the judgment of the court, would promote the child's health and welfare.*" * * *"
(Italics mine.)

[Previous Interpretation]

On many occasions this court has interpreted this act to give the juvenile court the broadest of discretion in planning for the welfare of minors within its jurisdiction. If the relator prevails, the juvenile courts of this state will hereafter be imposed with a new limitation upon the exercise of their discretion in planning for a child's welfare by the requirement of compliance in every instance with the compulsory

school attendance law. Such a limitation would be highly detrimental to the efficient functioning of the juvenile court and is, in my opinion, beyond the contemplation of the juvenile court act.

The fallacy of relator's position can be illustrated by considering some of the routine problems which confront a juvenile court: The delinquent or dependent child within the compulsory school attendance age who, by his prolonged absence from school, is too far behind his age group to permit a school adjustment; or such child who is mentally incapable of adjusting in a public school; or such child who is a criminal offender; or such child who is incorrigible and refuses to submit to school discipline; or, as in this case, such child who, because of certain religious principles, refuses to obey instructions and is a misfit in any school.

The compulsory school attendance law does not contemplate that every child of compulsory school attendance age must come under the operation of the statute. The legislature wisely made provision that exceptions be provided where its operation would be impractical RCW 28.27.010 provides in part:

"The superintendent of the schools of the district in which the child resides, or the county superintendent if there is no district superintendent, may excuse a child from such attendance if the child is physically or mentally unable to attend school, or has already attained a reasonable proficiency in the branches required by law to be taught in the first eight grades of the *public schools or for any other sufficient reason.*" * * * (Italics mine.)

[An Unreasonable Conclusion]

It would be unreasonable to conclude that the legislature granted to the school authorities the power to excuse the operation of the statute, but withheld the same power from the juvenile court when it has authorized the juvenile court to make any order to promote the welfare of minors within its jurisdiction. Moreover, by permitting the relator to prevail, the juvenile court will hereafter be required to obtain permission from the proper school authorities to remove its wards from the operation of the compulsory school attendance statute. Such a result presumes that the legislature intended to give the school authorities the power to control a func-

tion of the superior court. It is inconceivable that this was the legislative intent.

The above discussion further illustrates that assuming *arguendo* the juvenile court in the instant case made an incorrect determination of what is and what is not a private school, the compulsory school attendance statute is nevertheless inoperative as to this minor by reason of the juvenile court having determined it is for the best welfare of this particular child to continue receiving her education from her parents in the home. In my opinion, the juvenile court clearly had the jurisdiction under RCW 13.04.090 to make this determination and did not abuse its discretion in so doing.

In the instant case, any fear that the relator school district may have that the finding of the

juvenile court defines a private school should be allayed, since the finding relates only to this particular child in the court's consideration of her welfare. This is not a case in which the requirements for a private school are being tested, but is clearly a case to determine whether or not a juvenile court judge may plan for the welfare of his wards without being limited by the compulsory school attendance law of this state.

The judgment of the trial court should be affirmed.

ROSELLINI, J., concurs with HUNTER, J.

HILL and FINLEY, JJ., concur in the conclusion of the dissent that the judgment of the trial court should be affirmed.

EDUCATION

School Employees' Affiliations—Arkansas

Max CARR et al. v. R. A. YOUNG et al.

Supreme Court of Arkansas, February 8, 1960, 331 S.W.2d 701.

SUMMARY: A University of Arkansas associate professor and a Little Rock Central High School instructor brought actions in a state chancery court for decrees declaring the "teacher-affidavit law" unconstitutional as infringing upon their freedoms of speech, assembly, association and thought and allied rights under the Fourteenth Amendment and state constitutional provisions. The suits were consolidated. The trial court upheld the statute [3 Race Rel. L. Rep. 1049 (1958)], which provides that no person shall be employed in an administrative or teaching capacity in any of the state's public schools, colleges, and universities without first having filed with the employing authority an affidavit listing the names of organizations to which he has belonged, paid dues, or made regular contributions during the past five years. On appeal, the state supreme court affirmed. Stating that such inquiry is the usual practice of private employees and that the required information could be of real value to public employing authority, the court held that the act was not unconstitutional on its face, its prima facie validity being "pretty well settled" by *Adler v. Board of Education of City of New York* [342 U.S. 485 (1952)]. The court also refused to void the Act because it might be unconstitutionally applied, noting that there was no proof that officials are inclined to use the Act discriminatorily—only that some Citizens' Councils members advocated such. Moreover, it was pointed out that as the information was only for use by school boards, and the like, there was no need that it be made public and that evidently so far affidavits had not been publicized. Finally, the court emphasized that no matter what the affidavits revealed, employing authorities were not required to take any action, and so it could not be predicted now whether any teacher would ever be eliminated from employment as a result of complying with the Act.

SMITH, Justice.

This case involves the validity of the teacher-affidavit law, Act 10 of the 1958 special session. The appeal is from a declaratory decree upholding the statute.

Two suits were consolidated in the trial court. In one the appellant Carr, an associate professor of music at the University of Arkansas, acting for himself and others similarly situated, sought a decree declaring the act unconstitutional and enjoining its enforcement by the defendants, the president and trustees of the University. The other case is a similar class suit brought by the appellant Gephardt, a vocational printing instructor at Little Rock Central High School, asking for like relief against the Little Rock Special School District and its superintendent and directors. Both plaintiffs assert that Act 10 infringes upon their freedom of speech, freedom of assembly, freedom of association, freedom of thought, and allied rights, all protected by the Fourteenth Amendment and by parallel provisions in the Arkansas constitution.

[Act 10 Provisions]

Act 10 provides that no person shall be employed as a teacher in any of the state's public schools or as a superintendent or principal in any elementary or secondary school without having first filed with the employing authority an affidavit giving the names and addresses of all organizations and associations to which the applicant has belonged within the preceding five years or to which he has paid regular dues or made regular contributions within that time. Other provisions of the act nullify any contract made in violation of the statute, permit the recovery of funds paid under such a void contract, and fix civil and criminal penalties for the willful filing of a false affidavit.

The appellants' attack upon the act may be considered in two aspects: First, is Act 10 unconstitutional on its face? Secondly, if the act is outwardly valid, does the record show that the statute was intended to be applied, and will in fact be applied, in such a way as to deprive the appellants and those they represent of their constitutional rights?

[Act 10 Not Prima Facie Invalid]

We do not find Act 10 to be invalid on its face. By § 1 of the act the legislature declared

its belief that the public school system would be benefited as a result of the school authorities having the required information about applicants for the positions covered by the statute. It cannot be doubted that the information would often be of real value to the employing school board. We are not convinced that either the federal or the state constitution compels a school board to engage its teachers without first inquiring about the matters that the act requires to be disclosed.

A similar question was presented long ago, in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N.E. 517, where a policeman complained of a city regulation that prohibited him from soliciting money or aid for political purposes. In the familiar words of Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . the city may impose any reasonable condition upon holding offices within its control."

The appellants are not entitled to demand that the University and the Little Rock school board employ them without making any inquiry about organizations to which they have belonged within a period reasonably close to the date of the application. Such investigations are the usual practice among private employers, and, as the court pointed out in *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, public employers are not denied the privilege of making similar inquiries. From that opinion: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

[Adler Case Relied Upon]

The prima facie validity of Act 10 is pretty well settled by the holding in *Adler v. Board of Education of New York*, 342 U.S. 485, where the court sustained a state statute forbidding the employment in the public school system of persons belonging to organizations found to

be subversive. This language in the opinion is peculiarly pertinent to the case at bar:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10.

[*Shelton v. McKinley*]

We conclude, as did the three-judge district court in *Shelton v. McKinley*, D.C. Ark., 174 F.Supp. 351, that the act is not unconstitutional on its face. We do not, of course, pass upon the wisdom of the law, for as the court said in the *Shelton* case: "We think that the information required by Act 10 is relevant. The fact that some educators and members of the public may feel that this requirement is unwise, or unnecessary or even insulting does not mean that the statute is unconstitutional. Those are considera-

tions of the legislative, not the judicial branch of the government."

There remains the contention that Act 10, even if ostensibly valid, is subject to being used in an unconstitutional manner. Upon this point the appellants offered three witnesses. Two of them, the Attorney General, whose office assisted in the drafting of the bill, and the state senator who introduced the measure in the legislature, testified that the act was intended as a weapon against subversion. Such expressions of individual opinion are not competent to show the legislation intention, *Wiseman v. Madison Cadillac Co.*, 191 Ark. 1021, 88 S.W.2d 1007, but even if the testimony were considered it would not create any doubt about the validity of the act.

The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the state meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.

[*Discriminatory Application?*]

We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights. In reaching this conclusion we are not unmindful of the settled principle that a statute, even though fair on its face, may become invalid if it is administered by the state "with an evil eye and an unequal hand." *Yick Wo v. Hopkins*, 118 U.S. 356.

Here, however, the proof does not show any inclination on the part of any school board to use Act 10 in a discriminatory manner. The most that can be said is that at least some members of the Citizens Councils are so ill-advised as to advocate that course. "Ill-advised" is the proper term, since such an effort, if successful, would

defeat its own purpose by rendering the act invalid.

It is very far from certain that efforts to misuse Act 10, if any are made, will succeed. Inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone. The only testimony on this point indicates that the affidavits are not being publicized; the president of the University testified that its affidavits are being treated as confidential and are being kept under lock and key.

[*Refusal to Make Assumptions*]

Moreover, even if secrecy should not be observed in every instance it still cannot be

surely predicted that any teacher will be eliminated from the school system. Unlike the statute upheld in the Adler case, *supra*, which mandatorily forbade the employment of persons belonging to subversive organizations, Act 10 does not affirmatively require a school board to take any action, no matter what associations an affidavit may reveal. Thus in order for us to invalidate Act 10 at this stage of its existence we should have to assume, wholly without proof, that conscientious and responsible school board members will inevitably yield to a nebulous public insistence that the act be applied discriminatorily and in disregard of recognized constitutional guaranties. We are aware of no principle that requires us to attribute improper motives to public officers as a means of enabling us to declare an act invalid.

Affirmed.

EDUCATION Teachers—Delaware

BOARD OF EDUCATION, LAUREL SPECIAL SCHOOL DISTRICT v. Alonzo Hilton SHOCKLEY, Jr.

Supreme Court of Delaware, December 11, 1959, 156 A.2d 214.

SUMMARY: A Delaware school district board of education discharged a Negro principal on insubordination grounds, but the state superior court set the decision aside and ordered reinstatement. 149 A.2d 331 (Del. Super. Ct. 1959). On appeal the state supreme court found the board's insubordination finding supported by substantial evidence and remanded the case to the superior court to vacate its order. But it was also held that the board had erred in refusing to receive evidence which the principal contended would show that the insubordination charge was only a subterfuge and that the discharge was made because of racial bias. The superior court was therefore instructed to remand the case to the board which was to hear the testimony as to circumstances indicating bias toward the principal, to determine whether it had been guilty of such bias, and to dismiss or sustain the charges accordingly. 155 A.2d 323, 4 Race Rel. L. Rep. 896 (Del. 1959). In denying a petition for re-argument, the supreme court stated that on remand the board, after receiving any pertinent evidence by the principal as to bias, should re-evaluate *all* the evidence in deciding whether to affirm its prior ruling; that, if the board so affirms and the principal appeals, the superior court must re-evaluate the case as a whole in the light of all the evidence in determining whether to uphold its prior decision; but that if the latter court then should find there is substantial evidence to support the board's finding, it must affirm the board's finding.

BRAMHALL, Justice.

Appellee has filed a petition for re-argument, in which he suggests that this court should have withheld its decision until the evidence relating to the September meeting of the Board has been

taken and the record is complete. He states that the action of this court in finding substantial evidence to support the action of the Board necessarily assumes that the Board was free from bias and is therefore inconsistent with its direc-

tion to the Board to hear testimony relative to the September meeting, as to which it was charged that the Board was guilty of bias. Appellee contends further that the effect of the bias issue on this court's application of the substantial evidence rule is a matter which reaches to the fundamental rights of appellee, denying appellee due process of law in violation of Section 7, Article 1, of the Constitution of the State of Delaware, Del.C. Ann., and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Appellee requests this court to clarify its position as to whether the Supreme Court must reverse the Board and order the charge dismissed in the event that it should find the Board guilty of bias. We think that these questions call for further comment from this court.

Preliminarily appellee's charge of bias is objectionable as not being timely, since it was not raised in the trial before the Board. Nowhere in the record did he specifically charge the Board with being biased. We feel, nevertheless, in view of the seriousness of the charge against the Board, that we should comment upon it.

In directing that the Board permit appellee to show, if he can, that at the meeting in September the Board clearly demonstrated its bias towards appellee, we stated that we recognized the incongruity of asking the Board to pass upon the question of its own bias but that we were compelled to do so under the rule of necessity. While it is to be regretted that circumstances should arise making such a ruling necessary, the decisions of the United States Supreme Court and the highest courts in a number of states are clear that it must sit where, as here, there is no other tribunal to decide the matter. *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887, 11 A.L.R. 519; *Board of Medical Examiners v. Steward*, 203 Md. 574, 102 A.2d 248; *Molloy v. Collins*, 66 R.I. 251, 18 A.2d 639, *Zober v.*

Turner, 106 N.J.L. 86, 148 A. 894; *State ex inf. Barrett ex rel. Bradshaw v. Hedrick*, 294 Mo. 21, 241 S.W. 402. This rule was also recognized in the Superior Court of this state in the case of *Lammot v. Walz*, 9 Terry 532, 107 A.2d 905. See generally 2 Davis Adm. Law, Sec. 12.04.

Where substantial evidence is presented showing that such a board is guilty of bias, a court will examine closely both the evidence before the Board and the reason or reasons upon which its findings are based. But it is still bound by the rule as laid down in Title 14 Del.C. § 1414, which provides specifically that the courts should sustain any Board action which is supported by substantial evidence.

Applying the statute to the circumstances of this case as now presented, we think that the Board must receive such pertinent evidence as the teacher may offer upon the issue of bias. The Board should then re-evaluate *all* the evidence and determine whether its prior ruling should stand. If it adheres to its former decision and the teacher elects to appeal, the Superior Court must then re-evaluate the case as a whole in the light of all the evidence and determine whether its prior decision should stand. If, however, after such re-evaluation, taking into consideration this Court's opinion on the merits, the Superior Court should find that there is substantial evidence to support the finding of the Board, it must, in view of the statute and of our prior opinion, affirm the Board's finding. We repeat, however, that in such a re-evaluation the Superior Court should scrutinize the Board's determination with great care in the event that bias has been shown. *Wisconsin Telephone Co. v. Public Service Commission*, 232 Wis. 274, 287 N.W. 122, 149, 593.

To the extent that any statement in our former opinion is inconsistent with the procedure above set forth, that opinion is modified accordingly.

The petition for re-argument is denied.

CIVIL RIGHTS STATUTES

Arrest—Federal Statutes

Robert W. CRAWFORD v. Lt. Deniz LYDICK et al.

United States District Court, Western District of Michigan, December 2, 1959, 179 F.Supp. 211.

SUMMARY: A Kalamazoo, Michigan, police officer issued a complaint charging plaintiff with armed robbery, and a Michigan warrant was issued. On the request of the Kalamazoo police, plaintiff was arrested in Toledo, Ohio, brought before a judge, and signed a waiver of extra-

dition and consent to being delivered to Michigan police. He was returned to Michigan and tried, convicted, and sentenced to 15 to 25 years for armed robbery. After he was in prison, plaintiff filed suit in a Michigan federal district court for \$175,000 against the complaining Kalamazoo officer, the arresting Toledo officer, the municipal judges of Kalamazoo and Toledo, the clerk of the Toledo court, the Michigan officers who returned him, and the Michigan trial judge. He alleged that the defendants conspired to violate his civil rights by the extradition. The action was dismissed as to all defendants, the federal court holding that it had no jurisdiction over the Ohio defendants, that judges acting in their official capacity are immune from civil liability, and further, that there was no cause of action stated. The court also ruled that in a civil action for damages, it could not consider plaintiff's request to be released from prison.

CIVIL RIGHTS STATUTES

Judicial Decision—Federal Statutes

Guy N. STAFFORD v. SUPERIOR COURT of State of California, in and for the County of Los Angeles, et al.

United States Court of Appeals for the Ninth Circuit, October 26, 1959, 272 F.2d 407.

SUMMARY: Plaintiff had been engaged in litigation for several years over his alleged interest in some 1924 oil leases. Finally, he was enjoined from asserting any such interest in any further court action. He persisted and was adjudged in contempt, and the contempt charge was upheld in subsequent habeas corpus proceedings in the state courts. Thereafter, he filed in a federal court a petition for habeas corpus, combined with a suit for damages under the Civil Rights Act against the state court judges in the earlier actions, the defendants in the earlier actions, and the sheriff who placed him in custody on the contempt charge. The court dismissed for lack of jurisdiction. On appeal, the Court of Appeals for the Ninth Circuit affirmed, holding that the alleged errors of fact and law in the state court trials complained of cannot serve as a basis for establishing civil rights jurisdiction in federal court. Further, the court held that conspiracies between individuals are not of a kind covered by the Civil Rights Act.

CIVIL RIGHTS STATUTES

Legislative Reapportionment—Indiana

David L. MATTHEWS and Mary Ann Matthews v. Harold W. HANDLEY, Governor of the State of Indiana et al.

United States District Court, Northern District, Indiana, South Bend Division, June 13, 1959, 179 F.Supp. 470.

SUMMARY: Asserting jurisdiction under the federal Civil Rights Act, Indiana taxpayers filed a petition in federal court against the governor and other state officials, praying that the state income tax law of 1933 be declared unconstitutional and that defendants be enjoined from collecting the tax from plaintiffs, in violation of federal and state constitutional rights. The petition alleged that as the state constitution requires legislative reapportionment every six years and that as such action had not been taken since 1921, the legislature's acts since 1927,

including the 1933 income tax law, are void. The court granted defendants' motion to dismiss, refusing to exercise its equity jurisdiction, on the grounds that a state political question was at issue for which the plaintiffs had an adequate legal remedy through the power of the ballot, and that "Federal sovereignty must not and shall not invade this bulwark of State sovereignty."

GRANT, District Judge.

Plaintiffs herein have filed a petition praying for a declaratory judgment and for an injunction.

The petition alleges that this Court has jurisdiction under the Civil Rights Act, 42 U.S.C.A. § 1981 et seq., and alleges a violation of Federal and State constitutional rights. Plaintiffs further allege that defendants, as the Governor, other officials of the Executive Department of the State of Indiana, and the Sheriff of St. Joseph County, Indiana, are threatening and attempting to collect from plaintiffs a gross income tax for the year 1955. Plaintiffs further allege that as citizens of the State of Indiana they have the right to have the entire membership of the Indiana Legislature reapportioned, as provided in the State Constitution:

"The General Assembly shall, at its second session after the adoption of this Constitution, and every sixth year thereafter, cause an enumeration to be made of all the male inhabitants over the age of twenty-one years." Const. art. 4, § 4.

The petition alleges that the last reapportionment of the senatorial and representative districts was in 1921, and that in the absence of reapportionment since the year 1927 the subsequent acts of the Legislature are void and any action on the part of the defendants to collect this tax will be in deprivation of plaintiffs' constitutional rights. Plaintiffs pray that the Indiana Gross Income Tax Law of 1933, as amended, Burns' Ann.St. § 64-2601 et seq., be declared unconstitutional and that defendants be restrained from collecting, or attempting to collect the tax from plaintiffs.

Defendants herein have filed a motion to dis-

miss. Briefs have been filed and oral argument has been heard by this Court.

[A Purely State Political Question]

Historically, since the dawn of Courts of Equity in our Anglo-American system of jurisprudence, it has been held that Courts of Equity will not act in such a circumstance as here when adequate legal remedies exist. Plaintiffs have an adequate legal remedy available. Plaintiffs are asking this Court to concern itself with a purely State political question. The plaintiffs have the power of the ballot to correct any unrealistic apportionment of the State Legislature which might exist.

It is admitted that the Legislature has failed to reapportion the legislative districts as provided in the Indiana Constitution. No attempt is made here to defend this flagrant disregard of the plain, constitutional provision. However, the Federal Government is a body politic of strictly limited powers. The powers which were not specifically delegated to the Federal Government were reserved to the sovereign States of the Union.

We are here concerned with two, distinct, sovereign bodies: the State of Indiana and the United States of America. As stated above, we are here presented with a State political question in which the plaintiffs seek to invoke the Equity jurisdiction of this Federal Court. This Court has no jurisdiction to determine this question as the plaintiffs have adequate remedies at law available to them, and, what is more important, the Federal sovereignty must not and shall not invade this bulwark of State sovereignty. *Perry v. Folsom*, D.C., 144 F.Supp. 874.

Defendants' Motion to Dismiss is hereby granted.

CIVIL RIGHTS STATUTES

Police Brutality—Federal Statutes

James MONROE et al. v. Frank PAPE, et al.

United States Court of Appeals for the Seventh Circuit, November 23, 1959, 272 F.2d 365.

SUMMARY: Plaintiff, his wife, and their children filed suit in a federal district court seeking damages from police officers and the city of Chicago for alleged unreasonable searches, detention, and batteries. The trial court granted a motion to dismiss. On appeal, the Court of Appeals for the Seventh Circuit affirmed, holding that such activity by city police officers had repeatedly been held not within the proscription of the federal Civil Rights Act, and that any remedy plaintiffs might have must be prosecuted in state courts.

CIVIL RIGHTS STATUTES

Police Departments—Pennsylvania

Melvin HAIFETZ and Harvey Walters, etc. v. Frank RIZZO and the City of Philadelphia.

United States District Court, Eastern District of Pennsylvania, 178 F.Supp. 828.

SUMMARY: The proprietor of an espresso coffee shop brought action under the federal Civil Rights Act against city police officials, alleging that they were denying him and his customers the right to assemble peaceably by conducting a series of mass raids on the establishment. The court dismissed the action, holding that since the evidence showed the shop was being operated so as to be a public nuisance, it was within the power of the police to prevent such operation, and in so doing they were not acting to deprive plaintiff of rights, privileges or immunities protected by the Civil Rights Act.

CIVIL RIGHTS STATUTES

State Courts—Massachusetts

ISLAND STEAMSHIP LINES, INC. v. Paul W. GLENNON et al.

United States District Court, District of Massachusetts, November 3, 1959, 178 F.Supp. 292.

SUMMARY: A steamship company filed suit in federal district court asking for an injunction to prevent the enforcement of a state court injunction against the company's proposed operation of a coastal vessel between points on the Massachusetts mainland and Nantucket Island. Among other grounds, the company contended that it was deprived of its rights under the federal Civil Rights Act. The respondents filed a motion to dismiss, which was granted. The court ruled that the conduct complained of was not directed against the kind of political right, privilege, or immunity which is protected by the Civil Rights Act; and in any event, that Act would not allow an action in federal court which would have the effect of staying proceedings in a state court.

CONSTITUTIONAL LAW, INDIANS

Religious Freedom—Federal Statutes

NATIVE AMERICAN CHURCH OF NORTH AMERICA, a corporation, William Peter Tsosie, Shorty Duncan, and Frank Hanna, Jr., a minor, by and through Frank Hanna, Sr., his next friend v. **NAVAJO TRIBAL COUNCIL**, Paul Jones, individually and as Chairman of said Tribal Council, Joe Duncan and Sam Garnez.

United States Court of Appeals, Tenth Circuit, November 17, 1959, 272 F.2d 131.

SUMMARY: A church corporation and certain individuals brought a class action in federal court against the Navajo Tribal Council and named Navajo tribal officials, to enjoin the enforcement of an ordinance making it an offense to introduce, sell, use, or have possession of peyote beans in Navajo country. Plaintiffs alleged that, as the church used such beans in its ceremonies, the ordinance violates First Amendment rights of the church and its members. The district court dismissed the action, and the Court of Appeals for the Tenth Circuit affirmed. It was held that federal courts have no jurisdiction over matters involving purely penal ordinances of the Navajo tribe regulating reservation life, the tribe's internal affairs (including police powers) not being subject to laws of the United States. The court also rejected the contention that the First Amendment applies to Indian tribes so as to limit their powers to interfere with freedom of religion and worship. Indian tribes were classified as subordinate nations, possessed of all powers as such except those expressly surrendered to the superior sovereign, the United States; and, as no constitutional or statutory provision of the United States had made the First Amendment applicable to Indian nations, it was held that federal courts have no jurisdiction of even such tribal laws as have an impact on forms of religious worship.

Before MURRAH, Chief Judge, and PHILLIPS and HUXMAN, Circuit Judges.

HUXMAN, Circuit Judge.

This action was filed in the United States District Court for the District of New Mexico by the Native American Church of North America,¹ a corporation, William Peter Tsosie, Shorty Duncan, and Frank Hanna, Jr., a minor, by and through Frank Hanna, Sr., his next friend, against the Navajo Tribal Council, Paul Jones, individually and as Chairman of said Tribal Council, Joe Duncan and Sam Garnez. The action was brought by plaintiffs on their own behalf and in behalf of all others similarly situated. In its first cause of action, the church sought to enjoin the enforcement of an ordinance adopted by the Navajo Tribal Council making it an offense to introduce into the Navajo country, sell, use or have in possession within the Navajo country, the bean known as peyote, and imposing both imprisonment and a fine for its violation.

[Constitution Violations Alleged]

The first cause of action alleged that from time immemorial, the church and its predecessors have used the vegetable substance, com-

monly known as peyote, in connection with and as a part of its religious ceremonies. It was alleged that the ordinance was void because it violated the church's rights and the rights of its members under the First, Fourth and Fifth Amendments to the United States Constitution. The prayer was that the court enjoin enforcement of the ordinance. In a second cause of action, damages were sought from Sam Garnez and Joe Duncan. As to Garnez, it was alleged that he entered Shorty Duncan's house where religious ceremonies were being conducted, without a search warrant, searched the premises and the persons there present, and arrested Duncan and others, without a warrant, and thus deprived them of their liberty and right of worship without due process of law. As to Joe Duncan, it was alleged that he, acting as a judge of the Navajo court, denied Duncan the opportunity to secure counsel or to demand a jury trial, found him guilty of violating the ordinance and assessed penalties. Judgment for damages of \$5,000 was asked. The trial court sustained a motion by the defendants to dismiss plaintiff's first cause of action. The second cause of action is not in issue in this appeal.

1. Herein called the church.

The court predicated its judgment of dismissal on four grounds. First, that the ordinance was a valid exercise of police powers and was, therefore, not repugnant to the Constitution; second, that the Navajo Tribal Council cannot be sued without the consent of the Congress of the United States, which consent had not been given; third, that since the seat of the Government of the Navajo Tribe is in Window Rock, Arizona, the court was without jurisdiction over matters concerning the validity of the acts of the Navajo Tribal Council; and, fourth, that the face of the complaint shows a misjoinder of parties defendant and causes of action. In our view, not all of these grounds need to be discussed or considered in arriving at a decision of the case.

[*Status of Indian Tribes*]

Much has been written with respect to the status of Indian tribes under our Government, and with respect to the jurisdiction of Federal or State courts over controversies between non-members and a tribe, or between members of a tribe, or controversies between Indian members of a tribe and the tribe as an entity. The early case of *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 350, 8 L.Ed. 483, is the leading case on the subject. The opinion of Chief Justice Marshall developed the subject at great length. The gist of the opinion is that Indian nations and tribes are distinct political entities, having territorial boundaries within which their authority is exclusive; that within their borders they have their own Government, laws and courts, and are not subject to the laws of the State in which they are located or to the laws of the United States, except where Federal laws are made applicable to them by Congressional enactment, and that Federal courts are without jurisdiction unless jurisdiction is expressly conferred by Congressional enactment. In *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 1112, 30 L.Ed. 228, the court sums up their status in the following language:

"They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought

under the laws of the Union or of the state within whose limits they resided."

These declarations by the Supreme Court have been adhered to in a long line of cases.²

[*Indians' Political Entity Preserved*]

The status of Indian nations or tribes, preserving their political entity under the decisions of the Supreme Court, has been summed up in Felix S. Cohen's *Handbook of Federal Indian Law*, at page 122, as follows:

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e. g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i. e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

This subject was again before the Supreme Court in the late case of *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 270, 3 L.Ed.2d. 251. This case involved a suit by a non-Indian against an Indian member of the Navajo tribe for goods sold to him. This action was brought in the State courts. The court reviewed the status of Indian tribes. It adhered to the principles of the *Worcester* case. Concerning that case, the court said, "Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized,

2. *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 8 Cir., 231 F.2d 89; *Ex parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030; *Barta v. Oglala Sioux Tribe of Pine Ridge Res.*, 8 Cir., 259 F.2d 553; *United States v. United States Fidelity & Guaranty Co.*, 300 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894; *Toledo v. Pueblo De Jemez, D.C.*, 119 F.Supp. 429; *Talton v. Mayes*, 163 U.S. 376, 377, 16 S.Ct. 986, 41 L.Ed. 196; *Adams v. Murphy*, 8 Cir., 165 F. 304; *Thebo v. Choctaw Tribe of Indians*, 8 Cir., 66 F. 372.

but the basic policy of *Worcester* has remained." And speaking of the Navajo nation and the treaty with them, the court said, "Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs over the Indians remained exclusively within the jurisdiction of whatever tribal government existed." No law is cited and none has been found which undertakes to subject the Navajo tribe to the laws of the United States with respect to their internal affairs, such as police powers and ordinances passed for the purposes of regulating the conduct of the members of the tribe on the reservation. It follows that the Federal courts are without jurisdiction over matters involving purely penal ordinances passed by the Navajo legislative body for the regulation of life on the reservation.

[First Amendment Invoked]

But it is contended that the First Amendment to the United States Constitution applies to Indian nations and tribes as it does to the United States and to the States. It is, accordingly, argued that the ordinance in question violates the Indians' rights of religious freedom and freedom of worship guaranteed by the First Amendment. No case is cited and none has been found where the impact of the First Amendment, with respect to religious freedom and freedom of worship by members of the Indian tribes has been before the court. In *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986, 41 L.Ed. 196, the court held that the Fifth Amendment did not apply to local legislation by the Cherokee nation. In *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 8 Cir., 259 F.2d 533, the court held that neither the Fifth nor the Fourteenth Amendments had any application to action, legislative in character, of Indian tribes imposing a tax on the use of Indian trust land, and in *Toledo v. Pueblo De Jemez*, D.C., 119 F.Supp. 429, the court held that deprivation of religious liberties by tribal government could not be redressed by

action under the Civil Rights Act. Cohen's Handbook of Federal Indian Law, 1942, at page 124, states that restraints upon Congress or upon the Federal courts or upon the States, by the Constitution, do not apply to Indian tribal laws and courts. And, at page 181, it is stated that, "The provisions of the Federal Constitution protecting personal liberty or property rights, do not apply to tribal action."

[First Amendment Inapplicable to Indians]

The First Amendment applies only to Congress. It limits the powers of Congress to interfere with religious freedom or religious worship. It is made applicable to the States only by the Fourteenth Amendment.³ Thus construed, the First Amendment places limitations upon the action of Congress and of the States. But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States. Under the philosophy of the decisions, it, as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress. No provision in the Constitution makes the First Amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations, even though they may have an impact to some extent on forms of religious worship.

Affirmed.

3. *McCullum, People of State of Ill. ex rel. McCullum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649; *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954.

CRIMINAL LAW**Conspiracy, Mayhem—Alabama****Joe P. PRITCHETT v. STATE.**

Court of Appeals of Alabama, October 27, 1959, 117 So.2d 345, rehearing denied, November 24, 1959.

SUMMARY: In an appeal from a circuit court conviction of mayhem, the Alabama Court of Appeals adopted the fact findings in two companion cases, *Mabry v. State*, 110 So.2d 250, 4 Race Rel. L. Rep. 312 (Ala. App. 1959), and *McCullough v. State*, 113 So.2d 905, 4 Race Rel. L. Rep. 619 (Ala. App. 1959). In addition, the court rejected this defendant's contention that castration did not amount to mayhem under Alabama law.

CRIMINAL LAW**Indians—Oklahoma****Application of Eugene YATES for Writ of Habeas Corpus.**

Court of Criminal Appeals of Oklahoma, January 27, 1960, 349 P.2d 45.

SUMMARY: An Oklahoma penitentiary prisoner brought an original petition in the state court of appeals for habeas corpus, alleging that his conviction and sentence in a state trial court for manslaughter had resulted in an unlawful restraint of his liberty. He argued that the trial court lacked jurisdiction because the offense was committed against a person of Indian blood in Indian country so as to bring it within the exclusive jurisdiction of federal courts, under state constitutional and federal statutory provisions. Habeas corpus was denied on the grounds that: (1) petitioner had failed to allege that he is a full-blood Indian, which would be necessary to bring his case within the purview of the invoked statutes and cases decided under them; and (2) even if he were an Indian, he would not be entitled to habeas corpus relief inasmuch as the federal courts lack jurisdiction because the offense was not committed on lands within an "Indian Reservation" within the meaning of the statutory definition of Indian country when those lands, originally part of a reservation, had been ceded to the United States subject to allotment in severalty to individual tribe members.

BRETT, Judge.

ELECTIONS**Registration—Federal Statutes**

UNITED STATES of America v. Diaz D. McELVEEN, E. Ray McElveen, Saxon Farmer, and Eugene Farmer, individually and as members of the Citizens' Council of Washington Parish, Louisiana; Curtis M. Thomas, Registrar of Voters of Washington Parish, Louisiana, and the Citizens' Council of Washington Parish, Louisiana.

United States District Court, Eastern District, Louisiana, New Orleans Division, January 11, 1960, 180 F. Supp. 10.

United States Court of Appeals for the Fifth Circuit, January 21, 1960, No. 18169.

SUMMARY: The United States brought an action in federal court under the Civil Rights Act of 1957 [2 Race Rel. L. Rep. 1011 (1957)] against members of the Citizens' Council and

the registrar of voters of Washington Parish, Louisiana, charging that they had conspired to deprive Negro citizens of their vote by professing to purge rolls of illegal registrants. Defendants moved to dismiss, contending that the Civil Rights Act was unconstitutional because it could be interpreted to cover actions against private persons. The court refused to dismiss, holding that the language of the challenged sections was adequately clear in restricting its effect to persons acting under color of law. 4 Race Rel. L. Rep. 962 (1959). Subsequently the court issued an injunction enjoining the Citizens' Council members from participating in vote challenges or otherwise interfering with the right of citizens to vote, and enjoining the registrar from accepting the challenges. That order is reproduced below, together with an order of the Court of Appeals for the Fifth Circuit granting a stay in the injunction pending appeal by the registrar. (For further Supreme Court action in this case, see, *supra*, 5 Race Rel. L. Rep. 11).

DECREE

WRIGHT, District Judge

Pursuant to the Findings of Fact and Conclusions of Law, entered this date, it is ordered, adjudged and decreed that, pending further order of this Court:

1. Diaz D. McElveen, E. Ray McElveen, Saxon Farmer, and Eugene Farmer, individually and as members of the Citizens Council of Washington Parish, Louisiana, together with their agents and any persons acting in concert with them who have actual notice of this decree, are hereby enjoined from causing or initiating challenges or filing any affidavits of challenge which have as their purpose or effect discrimination based on race or color against registrants of Washington Parish, Louisiana, and from further engaging in any other acts and practices which would interfere with the rights of any citizens of the United States to vote at any election without distinction of race or color.

2. The Citizens Council of Washington Parish, Louisiana, its officers, members, agents, and any persons acting in concert with it who have actual notice of this decree, is hereby enjoined from causing or in any way participating in the filing of affidavits of challenge which have as their purpose or effect discrimination based on race or color against registrants of Washington Parish, Louisiana, and from further engaging in any other sets and practices which would interfere with the rights of any citizens of the United States to vote at any election without distinction of race or color.

3. Curtis M. Thomas, individually and as Registrar of Voters of Washington Parish, Louisiana, his deputies and agents, and the successors of each, are hereby enjoined as follows:

(a) From giving any legal effect whatsoever to the approximately 1377 challenges filed in the office of Registrar of Voters of Washington Parish, Louisiana, against Negro registrants of that parish by the four individuals named in paragraph 1 of this decree during the period February 1, 1959, to June 16, 1959, both inclusive, or from giving any legal effect to any prior proceedings or orders based directly or indirectly upon such challenges.

(b) From permitting the names of any of the approximately 1377 persons challenged as set out in paragraph 3(a) of this decree, to remain off the present and current rolls of qualified voters of Washington Parish, Louisiana, or from a legal supplement thereto, longer than ten days from the date of this decree. It is the intent and purpose of this paragraph that the persons enjoined shall do whatever is necessary to be done to reinstate within ten days from the date of this decree upon the current rolls of qualified voters in Washington Parish and upon all official copies thereof, the names of all of the said approximately 1377 persons.

(c) From acting upon or giving effect to any challenges of registrants in Washington Parish, Louisiana, which might hereafter be filed in his office which have as their purpose or effect discrimination based upon race or color.

4. In effectuation of this decree, Curtis M. Thomas, Registrar of Voters of Washington Parish, Louisiana, is further ordered to file with the Clerk of this Court within ten days from the date hereof, a detailed report in writing of his full compliance with the provisions of Paragraph 3(b) of this decree.

5. In further effectuation of this decree, Curtis M. Thomas, Registrar of Voters of Washington Parish, Louisiana, together with his successors, is further ordered to keep and maintain, from and after February 1, 1960, a tabulation showing the number of registrants of each race whose right to remain on the registration rolls of Washington Parish is challenged. If at the end of any three-month period thereafter, more than 5% of the registrants of any one race shall have been challenged, he shall within ten days thereafter submit to this Court a detailed report in writing concerning such challenges, giving the bases thereof and indicating whether the same or similar bases of challenges appear in the records of other registrants.

6. In further effectuation of this decree, the parties to this cause may at any time apply to this Court for an order for the inspection of, and photographing of, any or all records in the office of the Registrar of Voters of Washington Parish, Louisiana.

This Court retains jurisdiction of this cause for the purpose of issuing any and all additional orders herein as may, in its judgment, become necessary for the purpose of modifying the same if, in its judgment, modification becomes necessary, and for the purpose of enforcing the same.

ORDER IN CIRCUIT COURT OF APPEALS

Upon consideration of the Motion of appellant it is ordered that execution and enforcement of the judgment and decree entered by the United States District Court for the Eastern District of Louisiana, New Orleans Division, bearing Civil Action No. 9146, said judgment being dated January 11, 1960, is hereby stayed pending the determination of this appeal therefrom unless otherwise ordered.

January 21, 1960

Opinion

J. SKELLY WRIGHT, District Judge.

In the spring of 1959 the Citizens Council, professing a purpose to purge the registration rolls of Washington Parish, Louisiana, of all persons illegally registered, succeeded in disenfranchising 85% of the Negro voters of the Parish and 0.07% of the white. The United States in

this action charges that this profession of high purpose was a fraud designed to deny Negro citizens the right to vote. Made defendants and charged with conspiring with the Citizens' Council are several members of the Council and the Registrar of Voters for Washington Parish.

In a prior action this court denied the defendants' motion to dismiss. *United States v. McElveen*, D.C., 177 F.Supp. 355. Here the United States has moved for a temporary injunction. Based on the evidence offered by all parties in connection with this motion, this Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Individual defendants Diaz D. McElveen, E. Ray McElveen, Saxon Farmer, and Eugene Farmer are, and at all times material hereto were, registered voters of Washington Parish, Louisiana, and during the period from November 1, 1958 through July 1, 1959 were members of the defendant Citizens Council.

2. Defendant Registrar Curtis M. Thomas is, and has been since September 1949, the Registrar of Voters of Washington Parish, Louisiana, with his office in Franklinton, Louisiana.

3. Defendant Citizens Council of Washington Parish, Louisiana, is and at all times material hereto was, a nonprofit corporation incorporated under the laws of the State of Louisiana and domiciled in Washington Parish, Louisiana. One of its purposes is to maintain racial segregation in said parish.

4. Registration is a prerequisite under state law to voting in any election in the State of Louisiana, and may be either permanent or periodic. Washington Parish, Louisiana became a permanent registration parish in May of 1958 and a registered voter of this parish is not required to re-register unless his name is cancelled from the registration rolls in accordance with law.

5. The defendant Registrar in his official capacity as Registrar of Washington Parish was and is responsible, among other things, for registering of qualified applicants for registration, for keeping and preserving of registration records, and for cancelling from the registration rolls the names of all voters who lose their right to remain on the rolls.

6. Each registered voter of Washington Parish has a registration card, Form of Application for Registration, which, except in the cases of illiterates and the physically disabled, is entirely filled out by the registrant and sworn to before the defendant Registrar. The registration cards of current registrants are maintained in the office of the Registrar of Voters, and are filed in alphabetical order by precincts within the nine wards that comprise Washington Parish.

7. Acting under the authority of the laws of Louisiana, and more particularly Section 245, Title 18 LSA—Revised Statutes of 1950, the Individual Defendants, commencing in February 1959 and ending in June 1959, filed in the office of the defendant Registrar affidavits challenging the right of approximately 1,377 Negroes and approximately 10 white persons to remain on the registration rolls as qualified voters.

8. In filing the aforesaid challenges the individual defendants used the facilities of the office of the defendant Registrar, the official records kept therein, and the Forms of Affidavit of Challenge provided for by the laws of Louisiana.

9. The defendant Registrar, acting under the authority of Title 18 Section 245 of the LSA—Revised Statutes of 1950, issued and caused to be issued to the persons challenged, Citations of Notice to Erase requiring them to appear at the office of the defendant Registrar and prove by written affidavit of three bona fide registered voters their right to remain on the registration rolls.

10. Following and as a result of the challenges made by the individual defendants, the names of the persons challenged were removed from the registration rolls of Washington Parish. The number so removed was approximately 98% of the total that was removed from the rolls of Washington Parish during the period November 1, 1958 through July 1, 1959.

11. On November 30, 1958 there were 11,444 white persons and 1,517 Negroes registered to vote in Washington Parish, Louisiana. On June 30, 1959 there were 12,228 white persons and 236 Negroes registered to vote there. The decline in the number of registered Negro voters in Washington Parish between the dates November 4, 1958 and June 16, 1959 was a direct result of the filing in the office of the Registrar of Affidavits of Challenge by the individual defendants.

12. The Affidavits of Challenge filed by the individual defendants purported to be based on defects or deficiencies in the registration cards such as misspellings, deviations from printed instructions, failure to compute age with exact precision, and illegible handwriting.

13. The same defects and deficiencies are to be found in at least half of the registration cards of the white citizens of Washington Parish currently on the registration rolls. Analysis of a random sampling of 200 cards, 198 of which were of white persons, revealed that over 60% had such defects and inconsistencies, and the defendant Registrar, who has worked with all registration cards since 1949, testified that at least 50% had such errors and omissions.

14. In examining the Washington Parish registration records for the purpose of filing the said Affidavits of Challenge, the individual defendants limited their examination almost exclusively to the registration records of Negro voters while making only a token examination of the registration records of white voters. The individual defendants made no examination of the registration records pertaining to those wards in which no Negroes were registered and they challenged no voters in those wards.

15. The acts and practices of the individual defendants, as described, were committed and engaged in for the purpose and with the effect of depriving Negroes, solely because of their race or color, of the right to register and vote.

16. Based upon his knowledge that (a) the individual defendants virtually confined their examination of the registration records to those of Negro voters, (b) the challenges were directed almost entirely to Negroes and not white persons, and (c) the individual defendants filed Affidavits of Challenge involving defects and deficiencies which he knew also appeared in the records of white persons, against whom Affidavits of Challenge were not filed, the defendant Registrar was well aware of the racially discriminatory character of the challenges of the individual defendants.

17. Defendant Citizens Council at all times pertinent to this action approved and endorsed the aforesaid acts and practices of the individual defendants, all of whom were members of the defendant Citizens Council.

18. But for the acts and practices of the individual defendants in filing the Affidavits of

Challenge as described and the action of the defendant Registrar in giving effect to such challenges, the approximately 1,377 Negroes previously registered to vote and removed from the registration rolls would be presently registered to vote.

19. Unless restored to the registration rolls of Washington Parish the approximately 1,377 Negroes previously registered to vote will be unable to vote in the General Election to be held April 19, 1960.

CONCLUSIONS OF LAW

1. This court has jurisdiction of this action. 28 U.S.C. § 1345; 42 U.S.C.A. § 1971(d).

2. The individual defendants, in challenging the registration status of voters, were acting under color of the laws of Louisiana. Providing for and supervising the electoral process is a state function. *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152. The individual defendants participated in this state function under express authority of Louisiana law, using state facilities made available to them. *LSA-R.S. 18:245*. Their actions formed the basis of the removal of citizens from the registration rolls by the defendant Registrar acting in his official capacity. See *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S.Ct. 836, 92 L.Ed. 1161.

3. The challenges by the individual defendants, endorsed and supported by the defendant Citizens Council of Washington Parish, of which they were and are members, although not patently discriminatory on the face of each, were actually massively discriminatory in purpose and effect, and as such unconstitutional. U. S. Constitution, 15th Amend.; 42 U.S.C.A. § 1971(a). The result of the challenges was to remove almost all of the Negro voters from the rolls and leave the white voters practically untouched, even though over 50% of the white registration cards have the same defects and deficiencies as did the challenged Negro cards. A court need not, and should not, shut its mind to what all others can see and understand. *Child Labor Tax Case*, 259 U.S. 20, 37, 42 S.Ct. 449, 66 L.Ed. 817. Discriminatory application of a statute, even one unobjectionable on its face, is unconstitutional. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281.

4. The action of the defendant Registrar in

giving effect to the mass challenges of the individual defendants achieved a discriminatory result in violation of his duties under the 15th Amendment. Whether or not he had the racially discriminatory purpose which motivated the action of the individual defendants and the defendant Citizens Council is irrelevant as a matter of law. *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244.

5. The challenges, having been made in violation of the 15th Amendment and 42 U.S.C.A. § 1971(a), were and are themselves null, void and ineffective for any purpose, and the voters taken off the registration rolls as a result of these challenges were accordingly illegally removed. *Thornton v. Martin*, 1 Race Relations Law Reporter 213 (1956). It is of no bearing that some or all of the defects and deficiencies set out as basis for the challenges may in fact exist, and if nondiscriminatorily cited, could constitute legal grounds for removal of voters from the rolls as indicated in *Thomas v. McElveen et al.*, Civil Docket No. 18,751 22nd Judicial District Court, Parish of Washington, Louisiana. This is not a matter of a failure or inability to show a common injury. Compare *Reddix v. Lucky*, 5 Cir., 252 F.2d 930. Here the common injury, which is the fatal defect of each challenge, is a shared discrimination in the application of the law. *Frasier v. Board of Trustees, D.C.*, 134 F.Supp. 589, affirmed per curiam 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848.

6. Plaintiff, the United States of America, has an interest and obligation broader than that of any other individual litigant, which should be taken into account in giving effect to the broad remedial purposes of the Civil Rights Act of 1957. This is not a case as between private parties and should not be so construed. *State of Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 51 L.Ed. 1038. Courts of equity may, and frequently do, go much further both to give and to withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are concerned. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789.

7. The principle of the exhaustion of administrative remedies has no application to this case, since the qualifications of the persons challenged are not here at issue. The discrimination involved lies in part in the very act of subjecting the Negroes to the process of resorting to ad-

ministrative remedies which are not required of white voters similarly situated. To require exhaustion of administrative remedies would make this court a party to the discrimination claimed. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. In any event, the law itself expressly dispenses with the requirement of the exhaustion of administrative remedies. 42 U.S.C.A. § 1971(d). And where a person "has

been illegally removed from the voters' list his remedy lies in having the illegal action rescinded, not in re-registering." *Reddix v. Lucky*, 5 Cir., 252 F.2d 930, 937, 938.

8. This court has jurisdiction to issue an appropriate injunction in this case. 42 U.S.C.A. § 1971(c).

Judgment for plaintiff.

ELECTIONS

Registration—Federal Statutes

Stanley J. SMITH et al. v. Mary C. FLOURNOY, Registrar of Voters for Winn Parish.

Supreme Court of Louisiana, November 9, 1959, 115 So.2d 809.

Court of Appeal of Louisiana, Second Circuit, December 3, 1959, 117 So.2d 320.

SUMMARY: Registered voters of Winn Parish, Louisiana, instituted a proceeding under certain statutory provisions, against the parish registrar for a rule to show cause why she should not mail out notices to, and make publication of, eight named persons alleged to be illegally registered. The registrar filed various exceptions and a plea of unconstitutionality of the registration statute, all of which were overruled; and she applied to the state supreme court for writs of certiorari, prohibition, and mandamus for a stay order. With two justices dissenting, the judgment was affirmed and the case remanded for further proceedings. The supreme court held that the registrar lacked interest to attack the statute's constitutionality, and that persons whose registrations may be challenged under it are those who do not have all the qualifications required by specified constitutional and statutory provisions and those who had been lawfully registered originally but who had lost the right to vote in the place of original registration because of removal or other reasons. 115 So.2d 809 (La. 1959). Subsequently, the same parties brought a mandamus proceeding in the district court for Winn Parish against the registrar, alleging that they had filed affidavits with her reciting that seven named persons had been illegally registered or had lost their right to vote for specified reasons but that she had refused to notify the challenged persons, or make publication of their names, or to cite or summons them to appear and prove their right to remain on the registration rolls. A peremptory mandamus writ was therefore prayed to issue directing the registrar to perform her statutory duties. Three of the challenged registrants intervened and filed various exceptions and a plea that the statutes invoked by plaintiffs are contrary to provisions of the state constitution and the Fourteenth and Fifteenth Amendments to the United States Constitution. The exceptions and plea were overruled, and judgments were rendered for plaintiffs on the merits, commanding the registrar to comply with the statutory provisions. On appeal, the state court of appeals affirmed on the ground that the issues between these parties had already been set at rest by the supreme court. One justice dissented in part.

HAWTHORNE, Justice.

This proceeding was instituted by Stanley J. Smith and Hiram J. Wright, registered voters of Winn Parish, against Mary C. Flournoy, Regis-

trar of Voters for that parish, under the provisions of R.S. 18:133 and 134. Petitioners allege that they are entitled to the issuance of a rule directed to the registrar of voters to show cause

why she should not mail out notices to, and make publication of the names of, eight persons named in the petition who it is alleged are illegally registered. To the petition the registrar of voters filed exceptions of vagueness, no cause and no right of action, non-joinder, and a plea of unconstitutionality. The exceptions and the plea were overruled. The registrar applied for writs to this court, writs were granted, and the case is now before us under our supervisory jurisdiction. The case has not been tried on the merits.

[Statutory Requirements]

The pertinent provisions of Title 18 of the Louisiana Revised Statutes read:

"§ 132. Whenever the registrar has reason to believe that any name upon the books of registration has been illegally or fraudulently placed therein, or that any person has lost the right to remain thereon, he shall immediately notify the person by mail, at his address appearing upon the precinct register, of the alleged irregularity in registration, sending with the notification a printed citation requiring the person to appear within ten days from the mailing of the notice and citation, which date shall be stated in the citation, to show cause why his name should not be erased from the precinct register. The registrar, as soon as at least six names have accumulated, or in any event within not more than five days after mailing the notification, shall publish a notice segregating such names by ward and precinct, and requiring the registrants to appear in his office and prove the correctness of their registration. * * * The publication, shall require the registrants to appear within three days of the last publication and prove the correctness of their registration. If the registrants fail to appear within three days from the date of last publication, or within ten days from the date of mailing of the notice, whichever date is later, the registrar shall at once cancel the names from the precinct register and make a note thereon on the date of cancellation. However, if the registrants appear in person within the time aforesaid, and proof is submitted by them in the form of an affidavit signed and sworn to before the registrar or his deputy by three bona fide registered voters of the parish, that such

persons are legally entitled to remain on the books of registration, their names shall remain as voters on the precinct register unless ordered erased therefrom by order of court, as provided in this Part.

"The form of affidavit to be sworn to by the three bona fide registered voters shall read as follows:

"Personally came and appeared on this the.....day of....., 19....., before me, (Deputy) Registrar of Voters in and for the Parish of....., State of Louisiana, and, who being first duly sworn by me, do depose and say:

"That they are each personally acquainted with, registrant; that they have investigated the facts of the case, and of their own personal knowledge know that, now resides at Street, Precinct No....., Ward No..... of this Parish, and has continuously resided in that precinct and ward for the past months, and during that time has resided at the address aforesaid, and has resided in the Parish of for a period of

* * * * *

"§ 133. Upon an affidavit signed and sworn to in duplicate before and filed with the registrar or his deputy by any two bona fide registered voters of the parish, to the effect that after reasonable investigation and on information and belief certain persons are *illegally registered*, or have lost their right to vote in the precinct, ward, or parish in which they are registered by reason of removal or otherwise, the registrar shall immediately, or, in any event, within forty-eight hours, notify the registrants by mailing to them postage prepaid, at the addresses given in the precinct register, the duplicate copy of the affidavit, together with a printed citation requiring them to appear in person before the registrar or his deputy within ten days from date of the mailing of the duplicate affidavit and citation, which date shall be stated in the citation, and prove their right to remain on the registration rolls by affidavit of three bona fide registered voters in the form as provided in R.S. 18:132. The registrar shall immediately make a similar publication, as provided for in R.S. 18:132, and if the challenged registrants fail, with-

in the same delays provided in that Section, to prove their right to remain on the rolls, as in that Section provided, the registrar shall erase their names from the precinct register. [Italics ours.]

"§ 134. Should the registrar fail or refuse to mail the notice, to make the publication, or to erase a name when by the provisions of this Chapter it becomes his duty to do so, the person making the affidavit may, by rule on the registrar returnable within forty-eight hours after service, excluding Sundays and legal holidays, apply to the district court for the parish, without cost, and cause the registrar to show cause why such should not be done. The rule shall be tried in a summary way and by preference, in term time or in vacation, and the court shall immediately upon conclusion of the hearing enter its order in the premises. If the rule is granted, it shall fix a period of not more than three days from the date of the order within which the registrar shall comply therewith, and failing in which the registrar shall be held in contempt of court and punished accordingly."

Relator takes the position that she does not have to mail the notices or make the publication provided in R.S. 18:133 because the statute is unconstitutional in that it violates provisions of both the state and federal constitutions. Under the view we take of this case it is not necessary for us to detail the grounds of unconstitutionality alleged by relator.

[Mandatory or Ministerial Duties]

The registrar of voters is a public officer appointed under the provisions of Section 18 of Article 8 of the Constitution. R.S. 18:133 makes it the mandatory duty of the registrar to mail the notices and make the publication as therein provided. In other words, the doing of these things is a statutory duty of a ministerial character. Under the settled jurisprudence of this court relator is without interest to assert the unconstitutionality of the statute as a defense to a suit to compel the performance of ministerial duties imposed upon her by law. In *State ex rel. New Orleans Canal & Banking Co. v. Heard*, 47 La. Ann. 1679, 18 So. 746, 749, 47 L.R.A. 512, it was said:

"In *State ex rel. Nicholls v. Shakespeare*, 41

La. Ann. 156, 6 So. 592, this question arose and was expressly decided, the court holding that laws are presumed to be constitutional until the contrary is judicially established; and they must be executed by the officers upon whom they impose the duty of doing so, who have no authority to resist the execution thereof on the ground that they contravene the constitution.' . . .

" . . . In *mandamus* proceedings against a public officer, involving the performance of official duty, nothing can be inquired into but the question of duty on the face of the statute, and the ministerial character of the duty he is charged to perform. After a careful investigation of the authorities, we feel fully confirmed in the correctness of the conclusions we arrived at in *State ex rel. Nicholls v. Shakespeare*, and other cases, to the effect, that executive officers of the state government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as, constitutional and legal, until their unconstitutionality or illegality has been judicially established; for in all well-regulated government obedience to its laws by executive officers is absolutely essential, and of paramount importance. Were it not so, the most inextricable confusion would inevitably result, and 'produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of the government.' 'It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it.' The result of this conclusion is, that respondents are without right to urge the unconstitutionality of the concurrent resolution which is involved."

[Dore v. Tugwell Quoted]

In the recent case of *Dore v. Tugwell*, 228 La. 807, 84 So.2d 199, 201, this court stated:

"The Heard case, which represents the majority view in this country, enunciates the general rule that a public officer, charged with statutory duties of a ministerial character, is without interest or right to question the constitutionality of the statute affecting or prescribing such duties as a defense to a mandamus proceeding to compel their performance. See Annotation 129

A.L.R. 941, supplementing 30 A.L.R. 378, and cases there cited. This doctrine is founded in the basic tenet that, forasmuch as legislative acts are entitled to great respect and are presumptively constitutional, it would be inimical to public policy to allow a party without interest in a statute, and who is not injuriously affected by its enforcement, to assail its validity. *City of New Orleans v. Dameron*, 149 La. 535, 89 So. 685."

See also *State v. Board of Supervisors*, 228 La. 951, 84 So.2d 597; *Louisiana Motor Vehicle Commission v. Wheeling Frenchman*, 235 La. 332, 103 So.2d 464.

Relator recognizes the existence of the general rule pronounced in the cases cited above, but argues that it has no application to her in the instant case. For instance, she contends that she has taken an oath to support the Constitution, that this is her first duty, and that she cannot enforce a law directly in conflict with the Constitution. Relator's argument is not tenable. Under Article 19, Section 1, of the Louisiana Constitution of 1921, all officers, except as otherwise provided in the Constitution, must take an oath to support the Constitution, and if we were to hold that the mere fact of taking such an oath allows the public official taking it to question the constitutionality of a statute which he is entrusted with administering, we would in effect do away with the general rule altogether. Moreover, under Article 19, Section 1, of the Constitution, the officer making the oath must swear that he "will support * * * the Constitution and laws of this State * * *".

[May Registrar Attack Validity?]

Relator also says that the statute makes it her mandatory duty to get out the notices within 48 hours whether there be 10 or many thousands of them; that she is subject to a penalty of fine and imprisonment for violation of the registration laws; that there is a total absence of any standard or formula in the statute as to the number of challenges the registrar shall receive, and that as a consequence she is directly affected by the act and should be permitted to raise the constitutional question. We are not impressed with this argument. In these proceedings the registrar is not being prosecuted for violating the statute and is not here called upon to defend herself against the possible imposition of a penalty.

Relator also contends that the general rule is not a hard and fast one in Louisiana and cites several cases in which she contends an exception to the general rule was made. The cases cited and relied on are not appropriate and controlling here. We think the *Heard*, *Dore*, and other cases cited above are fully decisive of the issue here presented.

In support of her exceptions of no cause and no right of action and of vagueness relator contends that the affidavits filed by the two bona fide registered voters in this case are defective. Each affidavit in this case is in the language of the statute, and after naming the registrant and averring that he is illegally registered, it then specifically sets forth the reasons for the illegal registration. It is true that in the body of each affidavit it is recited that the two bona fide registered voters "Personally came and appeared before me Mrs. Mary Flournoy (Deputy) Registrar of Voters in and for the Parish of Winn State of Louisiana," whereas the jurat provides "Sworn to and subscribed before me, on this 21st day of August, 1959. [signed] Lottie N. Tullos, Deputy Registrar of Voters." It is to be noted, however, that relator does not contend that the affidavits were not sworn to and signed before the deputy registrar of voters. In our opinion the affidavits are sufficient under the provision of the statute that such affidavits are to be signed and sworn to before the registrar or the deputy registrar of voters. The jurats clearly show that these affidavits were signed and sworn to before the deputy registrar of voters, and thus the requirements of the statute are met.

[Registrar's Other Contentions]

Relator also argues in support of her exception of no cause and no right of action that R.S. 18:133 does not encompass the irregularities or illegalities set forth in the affidavits; that only voters who are registered in the wrong parish, ward, or precinct may be summarily challenged by affidavit under this statute; that the only irregularity or illegality toward which the statute is directed is lack of residence.

Relator contends that the words "illegally registered" in Section 133 refer only to those persons who are illegally registered because they do not possess the residence requirements for registration in the particular precinct, ward, and parish. She argues that she is supported in this conclusion by the form of affidavit set forth in

Section 132 as the only means by which a challenged person may offset the challenge.

[Rules of Statutory Construction]

In considering the provisions of Section 133 we are to be guided by certain recognized rules of statutory construction. In *Dore v. Tugwell*, supra, the court stated:

"* * * It has been many times said that it is the function of the courts to interpret the laws so as to give them the connotation the law-maker obviously intended and not to construe them so rigidly as to give them preposterous or odd meanings. *State ex rel. Womack v. Jones*, 201 La. 637, 10 So.2d 213; *Berteau v. Police Jury of Parish of Ascension*, 214 La. 1003, 39 So.2d 594 and *Webb v. Parish Council of Parish of East Baton Rouge*, 217 La. 926, 47 So.2d 718. The object of the court in construing a statute is to ascertain the legislative intent and, where a literal interpretation would produce absurd consequences, the letter must give way to the spirit of the law and the statute construed so as to produce a reasonable result. *Bradford v. Louisiana Public Service Commission*, 189 La. 327, 179 So. 442; See also *City of Shreveport v. Gregory*, 186 La. 407, 172 So. 435." [228 La. 807, 84 So.2d 204.]

R.S. 18:133 provides that upon affidavit sworn to in duplicate before and filed with the registrar or his deputy by two bona fide registered voters of the parish, to the effect that after reasonable investigation and on information and belief "certain persons are illegally registered, or have lost their right to vote in the precinct, ward, or parish in which they are registered by reason of removal or otherwise", the registrar shall within the time provided give notice to the registrants and make citation and publication as set forth in the statute.

Relator is, of course, correct when she says that one is "illegally registered" if he lacks the prescribed residence requirements. But since there are many requirements besides residence for a valid registration as a voter in this state, it is obvious that one may also be "illegally registered" for lack of any of these other qualifications prescribed by the Constitution and statutes. A careful consideration of this whole statute convinces us that there is only one reasonable interpretation of this provision, and that is that the registrants whose registration may be challenged under the statute are (1) those "il-

legally registered"—that is, those who do not possess all the qualifications for registration set forth in Article 8, Section 1, of the Constitution and R.S. 18:31—and (2) those who at the time of their registration possessed the qualifications provided in the Constitution and statutes of this state but who have lost their right to vote in the precinct, ward, or parish in which they are registered by reason of removal or otherwise. The statute clearly intends that the registration of persons falling into either category may be challenged by two bona fide registered voters of the parish in the manner set forth therein, and that when such challenges are made, it is the mandatory duty of the registrar to notify the challenged registrants in the manner provided by the statute and to issue citation to the persons challenged to appear before the registrar within the time set forth in the statute and prove their right to remain on the registration role.

[Proving Right to Remain Registered]

The statute further provides that any person whose registration is challenged may prove his right to remain on the registration roll by affidavit of three bona fide registered voters in the form provided in R.S. 18:132. The form of the affidavit as set forth in R.S. 18:132 is to the effect that the affiants are acquainted with the registrant who has been challenged and have investigated the facts of the case and of their own personal knowledge know that he resides as ——— Street, Precinct No. —, Ward No. —, of this parish, and has continuously resided in that precinct and ward for the past — months and during that time has resided at the address aforesaid and has resided in the Parish of — for a period of —.

Relator argues that since the statute provides that the challenged registrant may prove his right to remain on the registration roll by such an affidavit, this clearly shows that under this statute the only ground of challenge is failure to meet the residence requirements. In other words, she contends that the statute contemplates that one's registration may be challenged only on the ground that he has moved from the precinct, ward, or parish in which he is registered, or that he has never lived there, or that he has not lived there sufficiently long to be a qualified elector; and she argues that although he may be illegally registered for failure to meet some other requirement laid down by

the Constitution and statutes of this state, such an illegal registration cannot be challenged under this section.

To give this interpretation to the statute we would have to ignore completely the comprehensiveness of the term "illegally registered" and construe it narrowly to mean "illegally registered by virtue of the fact that they do not possess residence qualifications." We are convinced that the statute contemplates the challenge of any person whose registration is illegal for lack of any of the requirements for registration set forth in the Constitution and statutes.

[Legislative Intent]

The Legislature by enacting R.S. 18:133 clearly intended to provide a method of removing from the registration rolls (1) those registrants who are illegally registered—that is, those who did not possess the legal qualifications for registration required by the Constitution and statutes of this state at the time of their registration—and (2) those registrants who were legally registered at the time of their registration but who have lost their right to vote in the precinct, ward, or parish in which they are registered by reason of removal or otherwise. This intent is clear and unmistakable, and, the legislative intent being clear, it is the duty of the court to give full effect to this intent if possible.

To accept relator's contention that the language used in the form of the affidavit shows that registrants may be challenged under this statute only because of lack of residence qualifications would have the effect of nullifying the intent of the Legislature in regard to the right to challenge registrants who are illegally registered because they lack some requirement other than that of residence.

As we view the statute, the affidavit is simply an example of the type of affidavit that a challenged registrant would have three registered voters make were he challenged on the grounds of want of residence in the precinct, ward, or parish. When the statute is interpreted in this manner, the intent of the Legislature and the spirit of the law are given effect, and the statute is construed so as to produce a reasonable result.

[Which Parties Are Necessary?]

In support of her exception of nonjoinder relator contends that the registrants whose right to remain on the registration roll is being chal-

lenged should be made parties defendant. There is no reasonable basis for this exception. It is clear from R.S. 18:134 that the only indispensable or necessary party defendant in this suit is the registrar.

For the reasons assigned the judgment of the district court overruling relator's exceptions and plea of unconstitutionality is affirmed, and the case is remanded to the lower court for further proceedings according to law.

SIMON, J., dissents.

Dissent

FOURNET, Chief Justice (dissenting).

I am in accord with the majority view that under the jurisprudence generally prevailing the only issue that can be inquired into in a mandamus proceeding against a public officer involving the performance of an official duty is the ministerial character of the duty the officer is charged with performing on the face of the statute. But I cannot agree with the construction placed on R.S. 18:133 in the majority opinion, and particularly when this section is read in connection with R.S. 18:132.

It is my opinion that R.S. 18:133 does not encompass the irregularities or illegalities set forth in the affidavits in this proceeding, as the only irregularities or illegalities there sought to be reached are those having to do with the possession of the necessary residence requirements in a particular precinct, ward, and parish. This conclusion is not only supported by the clear language of the statute itself, but also by the language in the affidavit required to be submitted, which is set out in full in R.S. 18:132. Consequently, the trial judge erred in not dismissing this suit on the exceptions of no cause and no right of action.

It would seem to me, however, that although under the generally prevailing rule that the officer who is being coerced to perform a ministerial duty in a mandamus proceeding cannot challenge the constitutionality of the law imposing the duties sought to be enforced, we have often—and should—relax this rule in cases where the exigencies demand it, and decide all of the issues.

[Matter of Utmost Importance]

I do not think I need say that this matter, affecting as it does a state-wide election for all

local, parish, and state officials that is being conducted under a mandate of the constitution, is of utmost importance, for the result of the decision, whatever it may be, may well be the determining factor in the outcome of the election of some of these various officials. This is particularly true when we consider that Article VIII of the Constitution of 1921, dealing with suffrage and elections, declares that after January 1, 1922, the right to vote in Louisiana "shall not exist except under the provisions of this Constitution" (Section 1), and then, in the same section, there is set out the qualifications of those eligible to vote in this state and the manner of registering them. See, also, Sections 2 and 3. Section 4 makes it the mandatory duty of the legislature to enact laws to secure fairness in party primary elections, conventions, or other methods of naming party candidates and limiting the right to participate in such nominations to those who are duly qualified voters or "elector[s]" under the provisions of this Constitution."

[Right of Judicial Review]

Section 5 grants to any qualified person who may be denied registration the right to apply to the district court for relief and makes it the

mandatory duty of the court to try such case "in preference over all other cases *before a jury of twelve, nine of whom must concur to render a verdict*," the verdict as finally rendered not being subject to appeal on review. As to any names that may be illegally on the registration rolls of any parish, the right to have those names stricken from the rolls is specifically given in the next paragraph of Section 5 to any duly qualified and registered voter by applying to the district court for that purpose, but this application also must be tried by preference *before a jury of twelve, nine of whom must concur to find a verdict*, and their verdict is final except as to the person whose name is stricken from the role thereby, he alone being given the right of appeal. (The emphasis has been supplied.)

It is not the function of a court to order a public officer to do a vain and useless thing, and from the foregoing it is clear that the registrar is without authority to remove names from the rolls except in the manner provided in the second paragraph of Section 5. I have no doubt that those whose names are sought to be stricken from the rolls in this proceeding—as well as in all other similar proceedings—will avail themselves of this constitutional provision.

I must, therefore, respectfully dissent.

Court of Appeal Opinion

AYRES, Judge.

These are mandamus proceedings wherein plaintiffs seek to enforce the performance of a ministerial duty of a public official. The plaintiffs are electors of Winn Parish, Louisiana, who have challenged the qualifications as voters of seven registrants. The defendant is the registrar of voters. Three of the registrants, whose qualifications as voters are questioned, have intervened in the proceedings directed against them.

Plaintiffs, complying with the provisions of LSA-R.S. 18:133, made and filed affidavits with the registrar of voters reciting that Randell Powell, Almond Nash, Homer Washington, Eva Lee Webster, Thomas Weston, Arthur Holmes, and Oscar Rainwater are illegally registered, or have lost their right to vote, for the various reasons set forth in the affidavits. Despite the execution and filing of these affidavits with the registrar of voters, she has failed and refused

to notify the aforesaid registrants, or to make publication thereof, or to cite or summons them to appear and make proof of their right to remain on the registration rolls; whereupon, plaintiffs invoked the provisions of LSA-R.S. 18:134 and instituted these actions against the registrar, and prayed that a peremptory writ of mandamus issue in each of these cases directing and commanding the performance of the duties of the registrar as prescribed in LSA-R.S. 18:133.

[Exceptions and Plea]

The registrar, in each of these cases, filed and urged exceptions of no cause and of no right of action and a plea of unconstitutionality of the aforesaid statute as being inimical to the provisions of both State and Federal Constitutions and being, in particular, in violation of the provisions of Article 1, Section 12, and of Article 8, Section 5 of the Louisiana Constitution of

1921, LSA, and of the Fourteenth and Fifteenth Amendments of the United States Constitution. The exceptions were also predicated upon the alleged unconstitutionality of the Statute. Similar pleas and exceptions were filed and urged by the registrants who intervened.

The exceptions and pleas were overruled and, on the trial of the cases on their merits, judgments were rendered in favor of plaintiffs and against the registrar-defendant directing and commanding the compliance of the registrar with the provisions of the statute aforesaid. The registrar, as defendant in each of the cases, and the intervenors in three of the cases, appealed.

That a registrar of voters is a public officer and that LSA-R.S. 18:133 makes it the mandatory duty of the registrar to mail the notices and cause the publication to be made as therein provided for is not open to question. The statutory duty imposed by the statute on the registrar is of a ministerial character. A public officer charged by statute with the obligation and responsibility of performing ministerial duties is without right or interest to assert the unconstitutionality of the statute as a defense to an action to compel the performance of such duties. Laws are presumed to be constitutional until the contrary is judicially established; the officers upon whom have been imposed the duty of executing those laws are without authority to oppose their execution, however clear it may appear to them that the statutes contravene the Constitution. The inquiry in a mandamus proceeding alleging dereliction of duty in a public officer in the nonperformance of his duties is restricted to the question of the officer's duty, as prescribed by the statute, and the ministerial character of the duty he is charged to perform. See *Smith v. Flournoy*, 238 La. 432, 115 So.2d 809, 815, and the authorities therein cited.

[Supreme Court Ruling Cited]

All of the issues of the instant case, with the possible exception of the question of the right of the registrants whose registrations are involved to intervene, were presented recently in the aforesaid case between these parties, and the Supreme Court affirmed a judgment of the district court overruling exceptions of no cause and of no right of action and a plea of unconstitutionality of the statute herein involved. However, it was urged there, in an exception of

nonjoinder, that the registrants, whose right to remain on the registration rolls was challenged, were necessary parties-defendants. In answer to the contention, the court stated:

"There is no reasonable basis for this exception. It is clear from R.S. 18:134 that the only indispensable or necessary party defendant in this suit is the registrar."

If the registrants had no interest justifying or warranting their inclusion as parties-defendants, neither could it be said they have such an interest as would warrant or justify their intervention.

The statute (LSA-R.S. 18:134) provides for an expeditious and summary proceeding to accomplish the purposes intended by the statute, and the necessary parties to such a proceeding are designated as the persons making the affidavits challenging the registrants' qualifications and the registrar of voters. No provision is made for the allowance of interventions which would obviously tend to cause delay and thwart the purpose and intent of the statute in providing a summary and expeditious process to assure the prompt performance by the registrars of their ministerial duties. The time required for the filing, making service of, and putting at issue of interventions, if permitted, would cause delays, present issues, and result in complications not contemplated by the statute, the object of which is to secure the prompt discharge of the duties of the registrar. Had the Legislature deemed that the registrants, whose registration was challenged, had sufficient right or interest at that stage of the proceedings, that is, prior to the service of notice on the registrants, it could have, and no doubt would have, made ample provision for their inclusion as parties-defendants or as to their right to intervene. We therefore conclude the registrants were without right or authority to intervene in these proceedings.

[Legislative Wisdom Demonstrated]

The wisdom of the Legislature in its failure to provide for interventions in the statute involved is fully demonstrated by the present record. Plaintiffs' petition was filed November 19, 1959, and the rule was made returnable at 2:30 p.m. the following day, at which time the petitions of intervention were filed as were the aforesaid pleas and exceptions. Service of the interventions was not made nor were the inter-

ventions formally allowed by the court, or answered or put at issue. The record discloses no formal acceptance of service of the petitions of intervention and only from a statement contained in plaintiffs' brief before this court could it be concluded service was accepted. The time permitted by statute for the fixing and trial of a rule on the registrar is insufficient, as shown hereinabove, for the filing, allowance, service, and the putting at issue of a petition of intervention without unduly delaying and retarding the trial of a rule against a registrar.

Moreover, the rights of such registrants are unaffected until the registrar initiates action by the mailing and publication of notice in accordance with the terms of the statute. Prior to such action, their rights are unaffected. Nor, by the present action, have they been deprived of any constitutional or statutory rights to which they are entitled.

[Issues Here Previously Settled]

As heretofore pointed out, *the issues presented here have already been set at rest by the Supreme Court in a matter between the same parties.* This court is bound by the pronouncements of the Supreme Court as set forth in its majority opinion.

We, therefore, find no error in the judgment making the writs of mandamus peremptory. We do find, however, that the judgment should be corrected in some minor respects for the reason, among others, that the period of time in which the registrar was given to comply with the provisions of the statute has expired pending these proceedings. The judgment should be recast.

Accordingly, it is therefore Ordered, Adjudged and Decreed that the writ of mandamus herein prayed for be made peremptory and that Mary C. Flournoy, registrar of voters for Winn Parish, Louisiana, be and she is hereby ordered and directed to mail the notices of challenge to each of the registrants:

Randell Powell,
Almond Nash,
Homer Washington,
Eva Lee Webster,
Thomas Weston,
Arthur Holmes, and
Oscar Rainwater,

and to cause to be made publication of the filing and mailing of said challenges, in accord-

ance with the statute (LSA-R.S. 18:133), within 48 hours from the finality of this judgment, provided that all proceedings of whatsoever nature or kind are hereby stayed and held in abeyance for a period of 10 days from December 2, 1959 and/or pending the filing and denial, or the granting and final disposition, of applications to the Honorable, The Supreme Court of Louisiana, for writs of certiorari, prohibition, mandamus, and review, and for a stay order.

It is further Ordered, Adjudged and Decreed that all rights of each of the registrants be and they are hereby fully reserved, without prejudice, in any subsequent action or proceeding.

Amended and affirmed.

HARDY, J., concurs in part and dissents in part, assigning written reasons.

GLADNEY, J., concurs.

HARDY, Judge (concurring in part and dissenting in part).

In view of the well established jurisprudence of our courts, which clearly enunciates the general rule that a public official is without interest or right to question the constitutionality of a statute under the provisions of which a duty is sought to be compelled in a mandamus proceeding, I concur in the judgment of this court as set forth in the majority opinion with reference to Suits Nos. 9156, 9158, 9159 and 9162, each of which is entitled Stanley J. Smith, et als. v. Mrs. Mary Flournoy, Registrar of Voters for Winn Parish.

However, I am in emphatic disagreement with the conclusions of the majority in Suits Nos. 9157, 9160 and 9161, in which the registered voters, Almond Nash, Thomas Weston and Arthur Holmes, against whom challenges are sought by relators, have appeared by intervention.

My brethren of this court have concluded that the above named parties are without right to intervene in this mandamus proceeding which, so they conclude, involves solely and exclusively the right of relators to compel the performance of a ministerial duty. In support of this position the majority opinion relies upon the pronouncement of the Supreme Court in the suit of Smith v. Flournoy, No. 44,836, 238 La. 115 So.2d 809, 815.

[Prior Decision Not on Intervention]

The opinion of Mr. Justice Hawthorne in the above cited case makes no pronouncement

as to the right of intervention, for this issue was not involved. However, it is urged that the following declaration in the opinion must be considered as appropriate to the issue which is clearly presented in the appeal before us in these cases:

"In support of her exception of non-joinder relator contends that the registrants whose right to remain on the registration roll is being challenged should be made parties defendant. There is no reasonable basis for this exception. It is clear from R.S. 18:134 that the only indispensable or necessary party defendant in this suit is the registrar."

I have no quarrel with the above statement, but I do take violent issue with reliance upon it as ground for refusing the rights of intervenors in these cases. There is an obvious distinction between the interposition of a technical exception of nonjoinder by a public official and the positive assertion of a right by an intervenor who is entitled to an adjudication thereupon.

The right of intervention by any party having an interest in a suit needs no discussion. Nor is the right of intervention dependent upon permission of the Legislature granted in the provisions of a particular statute, as declared in the majority opinion. The interest which supports the right of intervention is clearly defined in Article 390 of our Code of Practice, which reads:

"Interest sufficient to warrant intervention.—In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit, or an interest opposed to both."

[Intervenors Have Existing Rights]

In my opinion, no amount of argument could possibly sustain the denial of the interest of these intervenors. It is specious reasoning to urge that the intervenors have no presently existing rights which are affected. Prior to this action intervenors held the status of qualified voters in Winn Parish. This status is being seriously jeopardized by the action of relators under an asserted statutory authority which intervenors contend is clearly unconstitutional. Of course, it is true that intervenors' rights to continue as qualified voters are not precluded by this peremptory proceeding. But, the effect of this action is to place a burden of inconvenience and expense upon intervenors in the assertion and protection of a right which they contend is not only constitutionally guaranteed but is safe-guarded by constitutional provisions as to procedure.

Nor can it be urged that an intervention does not lie in mandamus actions which exclusively seek to compel the performance of a ministerial duty. In *State ex. rel. Union Central Life Insurance Co. v. Dunn*, 133 La. 221, 62 So. 639, the court specifically recognized and sustained the right of interested persons to intervene in a mandamus proceeding.

If, as in the above case, the pecuniary and property interest of individuals are entitled to protection against the coercion of a mandamus proceeding, it is my belief that the inestimably more precious right to vote, which is the very foundation of all our governmental processes, is entitled to equal protection and assurance.

The far-reaching importance of this decision cannot be over-estimated. It is my fear that the relators, supported by the judgment which is rendered, have forged a weapon which may destroy the very things they seek to preserve.

EMPLOYMENT**Government Contracts—Federal****Allen TAYLOR v. PETER KIEWIT AND SONS COMPANY, a corporation.**

United States Court of Appeals, Tenth Circuit, October 19, 1959, 271 F.2d 639.

SUMMARY: A contractor agreed with the Veterans Administration to construct hospital buildings at Topeka, Kansas, the contract containing a non-discrimination provision in conformity with an executive order requiring such in federal contracts. Subsequently, he contracted to obtain labor from a local of an international plasterers and cement masons union, which agreed to furnish competent workmen. When the approach of winter required curtailment of the cement work, the contractor laid off all such workmen, white and Negro, except three foremen and a union steward. One of the Negroes laid off was a cement finisher previously ordered removed from certain of the work by a government inspector who rejected his finishing thereon. When the union did not later re-submit this Negro's name to the contractor for re-employment, the Negro complained to the international union that the local had thereby discriminated against him; but after an investigation the international denied the complaint. He then sued the contractor in federal court alleging that his discharge had been on account of race and color in violation of the Fourteenth Amendment, the Civil Rights Act, and the executive order. The district court, finding that there had been no discrimination but that plaintiff had been laid off because of a reduction of force and because other employees could do better work, rendered judgment for defendant; and the Court of Appeals for the Tenth Circuit affirmed. The Court of Appeals opinion and an appendix containing the executive order follow.

Before BRATTON, LEWIS, and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellant-plaintiff Taylor, a Negro, sued appellee-defendant Kiewit alleging that he was wrongfully discharged from his job as a cement finisher because of his race and color. The judgment below was for the defendant.

Kiewit was engaged in the construction business and had a contract with the Veterans Administration, an agency of the United States Government, to construct hospital buildings at Topeka, Kansas. Taylor was a member of the Operative Plasterers and Cement Masons International Association, Local Union No. 44. The union had a contract with the Associated General Contractors of Topeka, of which Kiewit was a member, covering the relationships between the union members and the signatory contractors. Except for situations not pertinent here, the contractors agreed to obtain workmen through the union and the union agreed to furnish competent workmen. The contractors had the right to discharge unsatisfactory employees, to determine the number of men to be employed, to assign employees to work, and to reduce the work force.

Pursuant to a request by Kiewit, the union sent Taylor to the job to work as a cement

finisher. He worked on May 1, 1956, and continuously from May 4, 1956, to November 9, 1956, when he was laid off. Thereafter the union did not resubmit his name to Kiewit for re-employment.

On this construction job there were three types of cement finishing, viz: rough slab, grinding and patching, and fine cement finishing. Taylor's rough slab work was satisfactory but a government inspector refused to accept his fine finishing and required his removal from that kind of work. Cement work is seasonal and when done in cold weather requires the use of heaters. In November, Kiewit was short of heaters and determined to reduce its force of cement finishers. A cement finisher of the white race was laid off on the same day as Taylor. At the time there were nine cement finishers on the job. Within the next few weeks all were laid off but four, of whom three had been foremen and one was a union steward.

The company records showed that from the start of the job until the layoff of Taylor 13.3% of the cement finishers were colored and that for the entire duration of the contract 18.1% were colored.

The contract between Kiewit and the Veterans Administration contained the nondiscrimination

clause required by Executive Order No. 10557 and signs reciting that clause were posted on the construction premises.

Taylor filed a written complaint with the international union that the local union had discriminated against him by refusing to resubmit his name to Kiewit for work as a cement finisher. The union conducted an investigation and denied the complaint.

Witnesses for Taylor testified that he was a qualified journeyman cement finisher who did satisfactory work. Testimony for Kiewit was that Taylor's fine finishing work was not satisfactory. Kiewit's supervisors stated that the fact that Taylor was colored had nothing to do with his layoff. Taylor testified that he complained to the general foreman and that the foreman told him that he was lucky to have been there as long as he had been.

After a full trial on the merits the court found:

"That plaintiff Allen Taylor was not laid off because of his color but because of a reduction of force coupled with the fact that other employees of defendant could do the type of work then required better than he could."

There is adequate evidence to sustain this finding. It is not clearly erroneous and consequently will not be disturbed on appeal.

Taylor says that his discharge was on account of his race and color and hence discriminatory in violation of the Fourteenth Amendment, the Civil Rights Act, and Executive Order No. 10557 requiring a nondiscrimination provision in federal contracts. As the record shows, and the trial court found that there was no discrimination it is unnecessary to consider the right of Taylor to maintain an action on any of the grounds asserted.

Affirmed.

Executive Order 10557

Approving the Revised Provision in Government Contracts Relating to Nondiscrimination in Employment

WHEREAS the contracting agencies of the United States Government are required by existing Executive orders to include in all contracts executed by them, a provision obligating the contractor not to discriminate against any employee or applicant for employment because of

race, creed, color, or national origin, and obligating the contractor to include a similar clause in all subcontracts; and

WHEREAS the Committee on Government Contracts is authorized by Executive Order 10479, as amended, to make recommendations to the contracting agencies for improving and making more effective the nondiscrimination provision of Government contracts; and

WHEREAS the Committee on Government Contracts in consultation with the principal contracting agencies of the Government, has recommended that in the future the contracting agencies of the Government include in place of, and as a means of better explaining, the present nondiscrimination provision of Government contracts, the following provision:

In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the nondiscrimination clause.

The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and in order to clarify and strengthen the provisions of the existing orders, it is ordered as follows:

Section 1. The contract provision relating to nondiscrimination in employment, recommended by the Committee on Government Contracts, is hereby approved.

Section 2. The contracting agencies of the Government shall hereafter include the approved nondiscrimination provision in all contracts executed by them on and after a date ninety

days subsequent to the date of this order, except:

a. contracts and subcontracts to be performed outside the United States where no recruitment of workers within the limits of the United States is involved; and

b. contracts and subcontracts to meet other special requirements or emergencies, if recommended by the Committee on Government Contracts.

Section 3. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this order.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE,
September 3, 1954.

EMPLOYMENT

Labor Unions—Federal Statutes

AIRLINE STEWARDESSES AND STEWARDESSES ASSOCIATION, INTERNATIONAL, an unincorporated labor organization v. TRANSWORLD AIRLINES, INC., a corporation.

United States District Court, Southern District, New York, February 25, 1959, 173 F.Supp. 369.
United States Court of Appeals, Second Circuit, December 14, 1959, 273 F.2d 69.

SUMMARY: An airlines stewards and stewardesses association, certified under the Railway Labor Act as the bargaining representative of flight stewards and hostesses employed by a certain airline company, brought an action in federal court seeking an injunction requiring the company to bargain with it relative to some fifty flight hostesses and stewardesses, not nationals or residents of the United States, but employed by the company solely in connection with flights outside the continental United States and its possessions. The district court granted defendant's motion for summary judgment and dismissed the complaint; and, on appeal, the Court of Appeals for the Second Circuit affirmed. It was held that a bargaining union certified under the Railway Labor Act may not represent foreign nationals, foreign based, and exclusively employed in foreign areas, because a federal statute in its coverage does not extend beyond the national boundaries unless a legislative intent clearly appears. Such an intent was not found here, as the Railway Labor Act is dependent upon the Interstate Commerce Act, the application of which is limited to carriers in interstate commerce, and in foreign transportation which takes place within the United States. [See also, *Airline Stewards and Stewardesses Association v. Northwest Airlines*, 267 F.2d 170, 4 Race Rel. L. Rep. 966 (8th Cir. 1959); *cert. denied*, 80 S.Ct. 208, 4 Race Rel. L. Rep. 850 (1959)].

EMPLOYMENT

Labor Unions—Federal Statutes

H. M. WILLIAMS et al. v. CENTRAL OF GEORGIA RAILWAY CO., Brotherhood of Locomotive Firemen and Enginemen, et al.

United States District Court, Middle District, Georgia, Macon Division, December 20, 1955, 178 F. Supp. 248. (Not reported in Federal Supplement until January 4, 1960).

SUMMARY: White employees of a railway company brought an action in federal court against the railway and the Brotherhood of Locomotive Firemen and Enginemen, as bargaining agent for the class represented by plaintiffs, to enjoin defendants from carrying out

contract provisions allegedly resulting in discrimination against white firemen and loss of their seniority rights solely because of their race. The contract required white firemen to take examinations for promotion to engineer, and any who failed the examinations or refused to take them were to be restricted to yard duty; Negro firemen, not eligible for promotion to engineer, were thus not subject to this restriction, and so might hold positions as road firemen even though they were of lower seniority than white firemen restricted to yard duty. On motion to dismiss, the court held it had jurisdiction because of the constitutional question of racial discrimination and that the dispute was not within the exclusive primary jurisdiction of the National Railroad Adjustment Board. 124 F.Supp. 164, 1 Race Rel. L. Rep. 192 (M.D. Ga. 1954). After a trial on the merits, the court found that although the railway had discriminated against Negro firemen as to promotability, the practice of requiring all white firemen to take examinations for promotion and the imposition of service restrictions on those who failed to pass did not constitute hostile discrimination against the latter, even though it might result in some Negro firemen holding better jobs than some white firemen. Having reaped the benefit of racial discrimination by standing for promotion to engineer, a position denied to Negroes, the plaintiffs were not to be permitted to claim discrimination when the favoritism shown them had attached to it a measure of inconvenience. Judgment was for defendants.

BOOTLE, District Judge.

These thirteen plaintiffs, white firemen, bring this class action against their employer, Central of Georgia Railway Company, their Railway Labor Act, 45 U.S.C.A. § 151 et seq., bargaining representative, the Brotherhood of Locomotive Firemen and Enginemen, and three of the latter's officers, seeking damages and equitable relief, claiming that certain collective bargaining agreements entered into between the carrier and the Brotherhood are unlawful in that in negotiating the said contracts the Brotherhood did not fairly and equitably bargain and act for, or on behalf of, all members of the class or craft of locomotive firemen affected by the negotiations and did not discharge its lawful duty, obligation and trust equally to protect the interests of all persons affected by the negotiations, but, on the contrary, acted exclusively for its own members and discriminated against these plaintiffs, depriving them of their right to work on fair and equal terms with Negro locomotive firemen and with members of the Brotherhood. All of the defendants deny the alleged discrimination and say that the agreements were entered into in good faith and are valid. The defendants set up also the defenses of laches, the statute of limitations, a contractual time limitation, acquiescence and failure to exhaust Brotherhood appeal remedies. The Brotherhood defendants also filed a motion to dismiss for lack of jurisdiction, asserting that the National Railroad Adjustment Board has exclusive primary jurisdiction, which motion was heard and overruled, as reported in *Williams v. Central of Georgia Ry. Co.*, D.C.M.D. Ga.1954, 124 F.Supp.

164. The case then came on for trial on the merits, the trial being limited to the issue of liability vel non and to whether or not the plaintiffs are entitled to injunctive relief, the question of damages, if any, being reserved for further testimony should the question of liability be resolved in plaintiffs' favor.

[Agreements Outlined]

The evidence shows that the Brotherhood and the carrier, through the collective bargaining process, entered into agreements effective as follows: February 16, 1938, December 1, 1944, and January 1, 1954. They were involved also in a compromise decree of this court, entered by Judge A. B. Conger, on March 25, 1952, in Civil Action No. 711, sometimes known as the "Curtis Washington case".

The gravamen of complainants' case is alleged discrimination as a result of a contractual provision which, as of the date of the filing of this action on October 12, 1953, found its expression in Section 10(c) of the agreement effective December 1, 1944. Section 10(a), (b) and (c) reads as follows, the portion against which complainants particularly complain being herein italicized:

"Section 10. (a) Firemen will be required to take examinations testing their qualifications for promotion as follows: All persons hereafter hired as firemen shall be required, in addition to showing, in the opinion of the Management, reasonable proficiency, to take within stated periods to be fixed by Management, but in no event to

extend over a period of more than three years, two examinations to be prepared by Management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

"(b) Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the proceeding (sic) paragraph shall be dropped from the service.

"(c) Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreement. *It being understood that firemen who hold road and yard rights and pass yard engineers examination and fail the road engineers examination as provided herein shall lose all road rights and will thereafter be a yard man only.*"

The history of that allegedly objectionable provision is material. The 1938 agreement did not require firemen to stand promotional examinations for engineers and, of course, did not provide any such penalty for refusal to take, or failure to pass, the examinations. The 1938 agreement is relevant here only historically. On February 18, 1941, this carrier and a number of other carriers and the Brotherhood entered into an agreement, commonly known as the Southeastern Carriers Conference Agreement, or the "Washington Agreement", effective February 22, 1941, which agreement, among other things, (1) restricted the non-promotable firemen (Negro firemen have traditionally been regarded as non-promotable to the position of engineer) in the exercise of their seniority to not more than fifty per cent of the runs on each class of service of each of the carriers, and (2) required that all other persons thereafter employed as firemen take promotional examinations to engineer in accordance with their standing on the firemen's roster subject to the penalty that if they declined

to take, or failed to pass, such examinations they were to be dismissed from further service on the railroad. These provisions were from that date continued in full force and effect until they were later incorporated into the 1944 agreement. The 1944 agreement was a new printing of the Firemen's Collective Bargaining Agreement with the carrier and included in it was the substance of the February, 1941 forced promotion rule constituting Article 26, Section 10 thereof, the pertinent portions of which are quoted above. It will be noted that the 1941 agreement provided that firemen refusing to take, or failing to pass, the examinations would be dismissed from service and that the 1944 agreement provided that firemen "hereafter" hired and declining to take, or failing to pass, the examinations would likewise be dismissed from service. During the interval between the 1941 and 1944 agreements a considerable number of firemen refusing to take, or failing to pass, the examinations were dismissed from the service. It was not until the 1944 agreement that the penalty of dismissal for refusal to take, or failure to pass, the examinations was minimized to restriction to yard service only rather than dismissal from the service. Were it not for the amelioration provided by the 1944 agreement, the provisions of the 1941 agreement would have called for the dismissal or discharge of all of the thirteen plaintiffs. The dismissal provision of the 1941 agreement antedated the employment of all of the plaintiffs except H. M. Williams, T. O. Barr and J. F. Kelley.

The dates of original employment of the respective plaintiffs by the carrier are as follows: Williams, 1937; Lott, 1943; Dooley, 1943; Lee, 1943; Taylor, 1943; Franklin, 1943; Lowery, 1944; Barr, 1941; Kelley, 1940; Barefield, 1943; Joiner, 1943; Biles, 1941; and Bateman, 1944. All of the thirteen plaintiffs, except Taylor and Franklin, failed to pass the promotional examination to engineer, and those two chose not to take it. Accordingly, all thirteen were restricted to yard service. The dates of restriction are as follows: Williams, 1945; Lott, 1948; Dooley, 1950; Lee, 1949; Taylor, 1948; Lowery, 1941; Barr, 1945; Barefield, 1947; Joiner, 1947; Kelley, 1944; Biles, 1948; and Bateman, 1953.

[Terms of 1944 Agreement]

The 1944 agreement provides that when reduction in traffic requires fewer engineers they will be demoted in accordance with seniority,

and they may displace firemen their juniors (Article 26, Section 1(a)). The right to yard firing is in accordance with seniority appearing on the yard firing rosters (Section 9(a)).

As a result of the penalty provision, the plaintiffs are restricted to yard service and are not permitted to exercise seniority rights as road firemen. They are permitted to serve as yard firemen and as yard engineers. Service as yard engineers is in accordance with yard engineer seniority on that particular roster under the agreements, and plaintiffs make no complaint as to their service as such.

Some Negro firemen are serving as road firemen having less road firing seniority than do some of the plaintiffs. Also, there are some white firemen so serving as road firemen while junior to some of the plaintiffs. The plaintiffs' fitness to serve as road firemen in the narrow meaning of that term, and without reference to their inability to become road engineers, has not been questioned by the carrier. Road firing in general is more lucrative and is, therefore, more desirable than yard firing, although it entails expenses of maintenance for time spent away from home. Seniority rights of firemen are valued rights, and by and large all of these plaintiffs depend upon their employment for their livelihood.

The Brotherhood, on January 26, 1948, after the courts had stricken down at the instance of Negro firemen the provisions of the 1941 agreement aimed discriminatorily at them, Brotherhood of Locomotive Firemen and Enginemen v. Tunstall, 4 Cir., 1947, 163 F.2d 289, served formal notice on this carrier of its desire to negotiate and consummate a change in the existing agreement so as to require that all firemen, promotable and nonpromotable (white and Negro), take the promotional examination to engineer. If this had been adopted the penalty would be dismissal from service of Negroes and whites alike. Negotiations were conducted, but were stopped by reason of litigation pending elsewhere. Brotherhood of Locomotive Firemen and Enginemen v. Palmer, 1949, 85 U.S.App.D.C. 429, 178 F.2d 722. In the Palmer case, an injunction was issued on April 28, 1948, by the District Court of the District of Columbia against this Brotherhood, enjoining it from further processing, not only on this carrier but on other southeastern carriers, this movement to apply the forced promotion rule and its consequences to both Negroes and whites. See also

Hinton v. Seaboard Air Line R. Co., 4 Cir., 1948, 170 F.2d 892, and Rolax v. Atlantic Coast Line R. Co., 4 Cir., 1951, 186 F.2d 473.

[Negroes File Suit]

On December 12, 1949, certain Negro firemen employees, including Curtis H. Washington, filed their action against this carrier and the Brotherhood, complaining that their seniority rights had been violated by the percentage feature contained in the Southeastern Carriers Conference Agreement of 1941, and seeking equitable relief and damages. On March 25, 1952, Judge A. B. Conger, of this court, signed a final decree enjoining said defendants from denying to the plaintiffs their rights to assignments as firemen because they were Negroes or because they had not been permitted or required to take or pass promotional examinations to engineer and restraining said defendants also from requiring such Negro firemen to take such examinations to qualify as engineers as a condition of their continued employment, or continued enjoyment of their seniority rights as firemen. Thus, the decree continued the 1944 agreement provision exempting Negroes from forced promotional examinations to engineer and from any penalty for failure to take or pass them. This was a consent decree entered after compliance with rules relating to notice and other provisions for disposition of class actions and was in accordance with the holding of several courts, Brotherhood of Locomotive Firemen and Enginemen v. Palmer, supra; Hinton v. Seaboard Air Line R. Co., supra; Rolax v. Atlantic Coast Line R. Co., supra, to the effect that the Brotherhood's proposal of January 26, 1948 was unfair to Negro firemen who had done back-breaking firing for several decades with no thought of, or prospect for, promotion to engineer. One of these Negro firemen, testifying in the case of Mitchell v. Gulf, Mobile & Ohio R. Co., D.C.N.D. Ala., W.D.1950, 91 F.Supp. 175, 182, on being asked if he wanted to become an engineer, replied that it was just "too late in the evening" for him to become an engineer.

The 1954 contract contains the same provisions relating to forced promotion and penalty as the 1944 contract. The restriction and its consequences are scheduled to continue. The carrier and Brotherhood officials who negotiated and agreed upon the forced promotion rule and penalty restriction complained of are all dead

with the exception of Mr. W. J. Collins, Director of Personnel of the carrier.

Restriction to yard firing is an advisable railroad operational requirement to provide for the training and maintenance of an adequate supply of qualified road engineers, inasmuch as road firing constitutes an essential experience for future road engineers and also an employment opportunity for desirable prospective engineers until such time as regular employment as engineers is possible. The restriction is a portion of the forced promotion rule requiring promotable firemen to take the examination for road engineer, and the forced promotion rule has become an established practice on the majority of the larger railroads of the United States. The restriction on this particular carrier for failure to pass or take the examination is more lenient than the restriction applicable generally on other railroads. In the absence of such restrictions firemen who could never become engineers would eventually preempt a great number of the road firing jobs, thereby lessening the opportunity for adequate training for prospective road engineers.

[Small Minority]

The thirteen plaintiffs represent a small minority of the men involved in the examinations, only some fifteen or twenty now being restricted out of approximately three hundred and sixty-eight white engineers. There was a shortage of engineers during World War II when the penalty was lessened from dismissal to restriction.

No Negro firemen junior to three of the plaintiffs, Biles, Joiner and Barefield, has occupied road firing runs in their district. A fourth plaintiff, Franklin, did not appear at the trial and did not substantiate his claim to being adversely affected.

The Brotherhood is composed entirely of white personnel and all officials of the carrier are white.

Of the thirteen plaintiffs, none filed suits within four years from the date the restrictive feature took effect in the agreement of 1944. Only three filed suits within four years from the date of their actual restriction, these being Dooley, Lowery and Bateman. None of the plaintiffs ever complained to the Brotherhood or to the carrier of the restrictive provisions themselves, as distinguished from their having been restricted thereunder.

The 1944 agreement provides in Article 26, Section 14(a) that "a statute of limitation of one year is hereby fixed for the handling by appeal, or otherwise, of any case involving seniority. If one year has elapsed without any written protest being filed, it cannot be handled by the committee or by the company, except as provided in Section 11(b) of this Article." Only one of the plaintiffs, Bateman, can be said to have filed any written protest within one year, his restriction being within one year of the filing of this suit. Several of the plaintiffs made oral complaints to Brotherhood Chairman Flowers, now deceased, and also to defendant carrier, some within one year and some much later. Some of them were told in response to their complaints that the contract was clear, and nothing could be done about it.

[Members of Brotherhood]

All of these plaintiffs have, from time to time, been members of the Brotherhood. All except Williams, Franklin, Lowery, Biles and Bateman were members when they were restricted. None of the plaintiffs were members on January 1, 1954, when the existing collective agreement became effective.

The Brotherhood constitution provides that any member who has a grievance against it in connection with its representation of its members' interest with the employer may resort to a system of appeal within the Brotherhood for redress, and said constitution denies resort to the civil courts to correct or redress any such grievance or to secure any alleged rights against it until such member shall first have exhausted all remedy by appeal provided by said constitutional provisions. None of these plaintiffs took any such action.

In the light of the facts of this case, which this court finds to be as above stated, we must examine the plaintiffs' contentions that the Brotherhood "did not fairly and equitably bargain or act for or on behalf of all members of the class or craft affected by such negotiations * * *"; that by reason of the agreements aforesaid these white plaintiffs "are discriminated against because they are white persons"; that the Brotherhood and the carrier conspired to enter into such agreements, and that "the said agreements were intended to and did operate to the serious injury" of the plaintiffs and others similarly situated.

[Traditional Policy]

The court finds further that the carrier has traditionally and consistently discriminated against the Negroes in the matter of promotability. The Brotherhood's explanation and attempted justification of this discrimination is stated forthrightly in its brief in this case as follows:

"The position occupied by the Negro firemen and the problems created thereby for both the Negro fireman and the White fireman can surely be viewed at this time with candor and fairness. Negroes have for generations been employed in substantial numbers as firemen by the southeastern railroads. Management employed the Negro with no expectation that he would ever be advanced to the position of engineer, for there were sociological considerations against placing a Negro in command of a train that no successful railroad management could flout.

"The White fireman was employed with the full realization that his counter-part, the Negro fireman, was to remain a fireman and hence would not become his superior and master through the process of promotion to the commanding position of engineer. At the same time, the White fireman entered upon his employment cognizant of a fact known throughout the railway industry, that his status as fireman was but a training ground for his eventual assumption of the responsibilities of engineers.

"The Negro was not misled, for he took up the employment of fireman with no less an understanding than that held by management and by the White firemen regarding the limitations imposed upon his employment by his social environs.

"These are factual conclusions that no man having even a passing acquaintance with the railway industry has failed to understand. They are facts that railroad men accepted, or yielded to, as elemental and perhaps permanent."

Apparently, that discrimination as to promotability has not been attacked in the courts. The attack in the series of cases headed by *Steele v. L. & N. R. Co.*, 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, and *Tunstall v. Brotherhood*, 1944, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187, was aimed at the further discrimination at-

tempted by the Southeastern Conference Agreement of February 18, 1941, which provided in part that on each railroad the proportion of nonpromotable firemen should not exceed fifty per cent, and that until such percentage was reached only promotable firemen would be hired. This extension of discrimination was prevented by the courts. Judge Parker, writing for the Fourth Circuit Court of Appeals in the case of *Brotherhood of Locomotive Firemen and Enginemen v. Tunstall*, supra [163 F.2d 293], said:

"The fact that the railroads have discriminated against Negroes in the matter of promotability, does not justify the Brotherhood, which represents them as bargaining agent, in making a further discrimination based on that discrimination. Because the railroads do not permit Negroes to hold the position of engineer, is no reason why a bargaining agent representing them should use its bargaining power to deprive them of desirable positions as firemen which the railroads do permit them to hold."

In the *Steele* and *Tunstall* cases relied upon by plaintiffs, an all white Brotherhood, charged under the law with the legal duty of bargaining fairly and impartially for all firemen, including nonmember Negro firemen, was accused of, and found to be, practicing intentional discrimination against the Negro firemen because of their race. This case, however, presents a different picture. As was said in the ruling on the motion to dismiss in this case: "Here, we have the novel situation of alleged racial discrimination within one race." It will not be presumed that an all white Brotherhood discriminated against its own members, or erstwhile members, on account of their being members of the white race. The evidence is entirely insufficient to show such discrimination. Discrimination is normally aimed at identifiable individuals or groups. When the dismissal provision was agreed upon in 1941 and when its ameliorated counterpart was agreed upon in 1944, the Brotherhood and carrier may have assumed that some unknown firemen would not successfully pass the examinations and would, therefore, be adversely affected by these contractual provisions, but they had no way of knowing who such unsuccessful persons would be. They knew only that they would be white men because only white men

were required, or permitted, to qualify by examination for promotion to engineer.

The white firemen, including these plaintiffs, have made, and now make, no complaint against the basic discrimination against the Negro firemen. Indeed, the white firemen, including eleven of the plaintiffs, have reaped the benefit of that discrimination by standing for promotion to the position of engineer, a position denied to the Negroes. Now, eleven of the plaintiffs having failed the examination, and two being unwilling to attempt it, say that they are discriminated against because the favoritism which was shown to them, and which they accepted without complaint, had attached to it a measure of inconvenience.

[Doctrine in Steele]

The sound doctrine of the Steele case is that the Brotherhood is under a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them", but the Supreme Court, as if to answer in advance the arguments of these plaintiffs, quickly added: "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit." [323 U.S. 192, 65 S.Ct. 232.]

The question here is not whether these contracts have "unfavorable effects on some of the members of the craft represented." The Supreme Court has said in the Steele case that such cir-

cumstances standing alone will not vitiate a collective bargaining agreement. See also *Ford Motor Co. v. Huffman*, 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048, and *Aeronautical Industrial District Lodge 727 v. Campbell*, 1949, 337 U.S. 521, 69 S.Ct. 1287, 93 L.Ed. 1513. The question here is whether the Brotherhood has practiced hostile discrimination against these plaintiffs and whether the carrier has conspired with the Brotherhood so to do. Judge Parker, writing for the Fourth Circuit in the case of *Rolax v. Atlantic Coast Line R. Co.*, 4 Cir., 1950, 186 F.2d 473, 477, said: "It is proper, of course, for the defendant railroad to adopt such rules regarding the service of firemen as are necessary to provide experience for the training of engineers and to enter into agreements with the Brotherhood representing the firemen with regard thereto * * *."

It did not constitute a hostile discrimination against such white firemen as might refuse to take, or fail to pass, the examination to discriminate in favor of all white firemen by permitting all of them to stand the examination and by promoting to the position of engineer all who successfully passed, restricting to yard duty (yard firing and yard engineering) those who refused to take, or failed to pass, the examination. These agreements provided for all white firemen a package deal which must be viewed in its entirety. One sailing downstream, thus enjoying the favorable current, cannot gracefully complain of the comparatively minor eddies and whirlpools.

Finding no hostile or unlawful discrimination against these plaintiffs and no conspiracy on the part of any of the defendants for such discrimination, the court finds it unnecessary to consider the other defenses. The plaintiffs are not entitled to any of the relief sought, and an appropriate decree may be prepared and presented, taxing costs against the plaintiffs.

FAMILY RELATIONS**Miscegenation—Arizona**

Henry OYAMA and Mary Ann Jordan v. Grayce Gibson O'NEILL, Clerk of the Superior Court in and for the County of Pima.

Superior Court, Pima County, Arizona, December 23, 1959, No. 61269.

SUMMARY: A man of the Mongolian race and a woman of the Caucasian race applied for a marriage license to an Arizona superior court clerk, but a license was refused them because the contemplated marriage would violate a statute providing that "The marriage of a person of Caucasian blood with a Negro, Mongolian, Malay or Hindu is null and void." The couple then brought an action in a state court against the clerk for a mandatory injunction requiring him to issue a marriage license to plaintiffs, and for a declaratory judgment that the invoked statute is unconstitutional, that plaintiffs are competent to become legally married in the state, and that they will thereupon be entitled to the property rights and jural relations of lawfully married persons. The court found that plaintiffs' rights to a marriage license are of an immediate nature for the enforcement of which there exists no plain, speedy, and adequate remedy at law and that an actual judicial controversy existed between the parties which rendered plaintiffs' rights and status uncertain. It also found that the intermarriages prohibited by the statute cannot adversely affect the public health, safety, morals, or welfare and that the progeny therefrom are not inferior in any respect to that of two persons of like blood. The court then declared the challenged statute to be in violation of the First and Fourteenth Amendments to the United States Constitution and of certain state constitutional provisions, and granted the other relief requested in the action.

KRUCKER, Judge.

This cause came on regularly for trial before the court sitting without a jury, a trial by jury having been waived, on the complaint of the plaintiffs and the answer of the defendant, the plaintiffs appearing in person and by their attorneys, Frank J. Barry, Jr., Charles E. Ares and Paul G. Rees, and the defendant appearing by Harry Ackerman, the County Attorney of Pima County, Arizona, by Jack Podret, Esq., Deputy County Attorney, and the Attorney General of the State of Arizona having filed herein his Acknowledgment of Service and Appearance, and appearing by Lawrence Ollason, Assistant Attorney General, and the court having heard the evidence and the stipulations of the parties and having been advised of the law in the premises, finds the following facts to be true:

FINDINGS OF FACT

1. That the plaintiffs, at all times material herein, were and they now are residents of Tucson, Pima County, Arizona, citizens of the United States of America and that they desire to intermarry; that the defendant is the Clerk of the Superior Court of the State of Arizona, in and for the County of Pima, and is charged with

the duty of issuing marriage licenses to qualified persons;

2. That on the 6th day of October, 1959, plaintiffs, as residents of Pima County, Arizona, made a proper and valid application to defendant for a license of marriage, pursuant to the provisions of the law in such cases made and provided; that at said time and place plaintiffs offered to subscribe to an oath that they would truly depose and declare their names, ages, their places of residence, the races to which each belong, and the relationship between the plaintiffs, all as required by law; that a written application to that effect was tendered to defendant; that all of the facts stated in said application were and now are true and correct; that, notwithstanding these facts, defendant refused and since said date continued and now continues, to refuse to accept said application or to accept their oath as to the truth of the facts stated in said application;

3. That plaintiffs have in all respects complied with the appropriate law and procedure to obtain a marriage license under the laws of this state;

4. That notwithstanding the foregoing facts, the defendant has refused and now refuses to issue to plaintiffs a marriage license solely upon

the grounds and for the reason that such marriage is forbidden by the provisions of Sec. 25-101(A), A.R.S., 1956;

5. That plaintiff Henry Oyama is not a person of Caucasian blood, but is of the Mongolian race; that plaintiff Mary Ann Jordan is a person of caucasian blood;

6. That the rights of the plaintiffs to secure the issuance of a marriage license are of an immediate nature and there exists no plain, speedy and adequate remedy at law for the enforcement or vindication of said rights;

7. That plaintiffs are Roman Catholics and are in all respects qualified to intermarry under the tenets and dogmas of their religion;

8. That the intermarriage of a person of caucasian blood with a Negro, Mongolian, Malay or Hindu cannot and does not adversely affect the public health, safety, morals, or welfare; that the progeny of a person of caucasian blood and a Negro, Mongolian, Malay or Hindu are not inferior in any respect to the progeny of two persons of caucasian blood, or of two Negroes, or of two Mongolians or of two Malays or of two Hindus; and

9. That there exists between the plaintiffs and the defendant an actual justiciable controversy which renders uncertain the rights and status of the plaintiffs, as to the right of the plaintiffs to intermarry, their entitlement to all of the rights of married persons should they apply for and be issued a marriage license and should they thereafter marry and as to their personal and property rights and jural relations both before and after marriage, whether within or without the State of Arkansas; and,

IT IS THEREFORE ORDERED, ADJUDGED, DECREED AND DECLARED:

a) That Sec. 25-101(A), A. R. S., is in violation of the First and Fourteenth Amend-

ments to the United States Constitution, and in violation of Article II, Sections 4 and 13 of the Arizona Constitution, and is therefore unconstitutional and void;

b) That by reason of the foregoing facts and by reason of the unconstitutionality of Sec. 25-101(A), A. R. S., 1956, the plaintiffs are in all respects competent, eligible and entitled to apply for and to receive from the defendant a license to intermarry in the State of Arizona, and that, upon complying with the other applicable requirements of law, they are in all respects competent, eligible and entitled to become and be legally intermarried within the State of Arizona; and

c) That, upon the consumation of a lawful marriage, the plaintiffs shall be entitled to the personal and property rights, and jural relations of lawfully married persons; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, Grayce Gibson O'Neill, the Clerk as aforesaid, her deputies, agents, associates and all persons acting in concert with her, be and they are hereby perpetually enjoined and restrained from refusing to accept plaintiffs' said application, from refusing to accept the oath of the plaintiffs to said application, and from refusing to issue said marriage license to the plaintiffs upon their application therefor; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said defendant, her deputies, agents, associates and all persons acting in concert with her, be and they are hereby commanded to issue a marriage license to the plaintiffs to intermarry, upon their application therefor notwithstanding the provisions of said Sec. 25-101(A), A. R. S., 1956.

DONE IN OPEN COURT this 23rd day of December, 1959.

GOVERNMENTAL FACILITIES

Airport Restaurants—Georgia

H. D. COKE v. CITY OF ATLANTA; William B. Hartsfield, Mayor; Jack Gray, Manager of the Atlanta Airport Terminal; Dobbs Houses, Inc., A Tennessee Corporation; B. F. Buttrey, Manager of Dobbs Houses, Inc., Restaurant at the Atlanta Airport Terminal.

United States District Court, Northern District, Georgia, Atlanta Division, January 5, 1960, Civil Action No. 6733.

SUMMARY: A Negro, waiting to change planes at the Atlanta, Georgia airport terminal, was issued a meal ticket by the airlines from whom he had contracted interstate passage and was directed to the airport restaurant. He declined to accept segregated seating and was refused service elsewhere in the restaurant. A class action for injunctive relief was then brought in federal court against the city and its mayor, the terminal manager, and the restaurant and its manager, plaintiff contending that as the restaurant was located on city property and subject to its supervision and control, refusal to serve him on the same basis as white passengers was a denial of equal protection and a burden on interstate commerce in violation of the United States Constitution. Defendants contended that the restaurant, as a private corporation leasing space for a business not subject to the city's control, had used its own judgment as to good business practices in requiring segregated seating. The court noted a statement by the Court of Appeals for the Fifth Circuit that without purpose of discrimination a local government might lease for private purposes "property not needed" for governmental purposes with the result that the lessee's subsequent operational conduct would be merely that of a private person. However, here even assuming no purpose of discrimination by the city, no joinder in the enterprise, and no express reservation of control in the lease terms, the court could find no showing that the "restaurant concession" space referred to in the lease contract as "certain space on the first floor of the new terminal building located on the . . . municipal airport—for the conduct . . . of a dining room" was not used or needed for city purposes. It was therefore held that the lessee's conduct was as much state action as would be similar conduct by the city and was a violation of plaintiff's rights to equal protection for which he was entitled to injunctive relief.

SLOAN, District Judge.

Plaintiff, a Negro man, a citizen and resident of the State of Alabama and City of Birmingham, on behalf of himself and others similarly situated, brings this complaint seeking injunctive relief. The defendants are the City of Atlanta, its Mayor, its Airport Manager, Dobbs Houses, Inc., and the Manager of the Dobbs Houses, Inc., Atlanta Airport Restaurant.

Briefly, plaintiff alleges that while an interstate passenger from Birmingham, Alabama to Columbus, Ohio, he had to change planes in Atlanta; that his connecting plane was late and that Delta Air Lines issued to him and other passengers Meal Authorization Tickets directed to Dobbs Houses, Inc. and directed plaintiff and his party to secure their meal at the restaurant of Dobbs Houses, Inc., in the Atlanta Airport Terminal.

Plaintiff contends that he and other passengers entered the Dobbs Houses Restaurant and that plaintiff was refused service at a table of

his choice and that the hostess directed him to a single corner table which was segregated behind a screen for the purpose of serving Negroes and refused to serve plaintiff on the same basis as white passengers.

[City Ownership of Property]

Plaintiff contends that the Dobbs Houses, Inc. restaurant in the Atlanta Airport Terminal is located on property belonging to the City of Atlanta and that the restaurant is subject to the supervision and control of the city and its agents. Plaintiff contends that the refusal to serve him on the same basis as white passengers was a denial of plaintiff's rights guaranteed by the equal protection clause of the Fourteenth Amendment to the United States Constitution and that the same constitutes a burden on interstate commerce which is forbidden by Article I, Section 8 of the United States Constitution.

Plaintiff seeks an injunction restraining defendants from making any distinction based

upon color in regard to services at the Atlanta Airport Terminal or the restaurant therein.

It is the contention of the City of Atlanta, its Mayor and Airport Manager that the space in the Airport Terminal which is occupied by Dobbs Houses, Inc. for its restaurant is leased to Dobbs Houses, Inc. and that the lease does not give the City the right to control the operation of the restaurant and that it has at no time controlled or sought to control the operation of the restaurant.

[City Control Alleged Lacking]

It is the contention of Dobbs Houses, Inc. that it is a private corporation and that it simply leases the space in which the restaurant is located and that the City of Atlanta does not have the right to control nor has it attempted to control the operation of the restaurant.

Dobbs Houses, Inc. contends that it employed its manager, Mr. Buttrey, and that the segregation, if it amounts to segregation in the dining room, is the result of its manager's own discretion without direction or control from the corporation or from the City of Atlanta and was dictated by his judgment that it was good business to maintain separate seating for white and Negro patrons and that the failure to maintain separate seating would cause in that restaurant a loss of patronage and decreased revenue.

FINDINGS OF FACT

1. Plaintiff, a Negro man, was and is a citizen and resident of the State of Alabama and the City of Birmingham, and is a vice-president and agency officer of the Protective Industrial Insurance Company of Alabama. This company operates and has agents only in the State of Alabama. Plaintiff's business requires some travel and he has occasion to pass through the Atlanta Airport from one to four times a year.

2. On August 4, 1958, plaintiff was enroute from Birmingham, Alabama, to Columbus, Ohio, to attend an insurance convention.

Upon arrival in Atlanta at the airport terminal, plaintiff went to the office of Delta Air Lines to arrange for a change over from Eastern Air Lines to Delta Air Lines. At that time, plaintiff was informed by an agent of Delta that his plane would be late and that he would not be able to get a meal on the plane and the Delta agent gave to plaintiff a meal ticket and directed him to carry the meal ticket to the

Dobbs Houses restaurant in the airport terminal for the purpose of being served a meal.

Plaintiff accompanied by two companions entered the Dobbs Houses restaurant and selected a table near the center of the restaurant and as they were about to seat themselves, the hostess approached and told them not to take seats at the table they had chosen, that they would have to be seated at a "table reserved for you people." This table was in one corner of the restaurant and was separated from the other tables by a screen. Plaintiff then asked the hostess why they must sit at the table behind the screen and the hostess replied that she had been "instructed by the management." Plaintiff then asked for the manager and was told that he was not there.

[Segregated Seating Refused]

Plaintiff and his companions refused to sit at the table designated by the hostess, whereupon the hostess told them they could be served at a cafeteria located outside the terminal building, but nearby, which the hostess pointed out to plaintiff and his companions. The hostess informed plaintiff that the same food served in the restaurant would be served in the cafeteria but the prices in the cafeteria would be cheaper. Plaintiff and his companions refused to go to the cafeteria for service there and returned to the office of Delta Air Lines where plaintiff reported to the agent that he had been refused service at the Dobbs Houses restaurant. The Delta agent looked at plaintiff's meal ticket, told him there had been a mistake in the authorized meal should have been \$1.75 rather than \$1.50 and made this change on the meal ticket and instructed plaintiff to return to the Dobbs Houses restaurant and assured plaintiff that he could obtain his meal there. Plaintiff and his companions then returned to the Dobbs Houses and were about to enter when the headwaiter met them and advised them not to enter the restaurant unless they were willing to sit at the table reserved for Negroes behind the screen, whereupon plaintiff and his companions did not again enter the Dobbs Houses restaurant.

3. There is constant use of the Atlanta Airport Terminal facilities by Negroes. The Henderson Travel Service, located in the City of Atlanta, has a clientele, the major portion of which are Negroes and in an eleven month period from

January 1, 1959 to November 30, 1959, sold airplane tickets amounting to \$82,683.85 which figure does not include sales purchased by the use of credit cards. The major portion of these tickets were purchased by Negroes for interstate travel. A spot survey at the Atlanta Municipal Airport between November 20, 1959 and December 1, 1959, showed the following count of Negro persons that were seen utilizing the facilities of the Atlanta Airport Terminal:

November 20, 1959—1:30 to 4:30 P.M., 19.

November 23, 1959—3:30 to 5:30 P.M., 13.

November 30, 1959—6:40 A.M. to 10:40 A.M., 22.

4. The restaurant of Dobbs Houses, Inc. located in the airport terminal in Atlanta is open to the public generally and any one who wishes to do so may patronize the restaurant but Mr. Buttrey, as manager of the Dobbs Houses, Inc. restaurant, determined that, for business reasons, segregation of the races would be maintained in the Dobbs Houses restaurant. This policy of segregation was that if the Negroes wanted to eat in the restaurant they would be seated at a table or tables reserved for Negroes which were separated from the other tables in the restaurant by a screen.

5. Dobbs Houses, Inc., nor its manager, at no time received any instructions or directions from the City of Atlanta; Mr. Gray, the manager of the airport; or any one else connected with the city, on the subject of segregation of Negroes within the restaurant. The decision to segregate Negroes from white customers within the restaurant was solely the decision of the management of Dobbs Houses, Inc. It was the opinion of the manager that such segregation was for the best business interest of his company and would actually be for the protection of Negroes in that it might save them embarrassment. The City of Atlanta had nothing to do with this decision and has never undertaken to exercise any control over the restaurant of Dobbs Houses, Inc.

6. The City of Atlanta owns the municipal airport. The City of Atlanta, through a manager and other employees, operates the airport and the terminal building. It leases space in the terminal building from which it received a revenue of \$523,599.30 for the year 1958.

7. The terms under which Dobbs Houses, Inc. occupies space in the Atlanta Airport Terminal are defined by a lease from the City of Atlanta

to Dobbs Houses, Inc., referred to in plaintiff's complaint appearing in evidence as Plaintiff's Exhibits 1 and 2.

The lease describes the space leased to Dobbs Houses, Inc. for the restaurant concession as being "... certain space on the first floor of the new passenger terminal building located on the above described municipal airport, marked 'restaurant concession' on 'Exhibit A' attached hereto and made a part hereof."

[The Lease Contract]

This lease provides, inter alia, that Dobbs Houses, Inc. shall pay a minimum rental of \$150.00 per month plus 6% of gross sales where such percentage exceeds the sum of \$1500.00 per month. The average monthly rentals coming from Dobbs Houses, Inc. to the City of Atlanta from January 1, 1959 to July 1, 1959, was \$17,805.60. The lease does not reserve to the city the right to control the operation of the restaurant, nor has the city, in fact, controlled or undertook to control the operation of the restaurant. The lease does provide that Dobbs Houses, Inc. shall render prompt service to the patrons of the airport. The only right to control reserved by the lease contract as to the manner and method of operating any of the concessions leased to Dobbs Houses, Inc. is contained in Article H(2) providing that "Dobbs shall submit to the manager of the airport, if requested, a schedule of articles and commodities proposed to be offered for sale at the tobacco and newsstands and the gift shop, and the prices proposed to be charged therefor and only articles or commodities having the approval of the manager of the airport shall be sold or offered for sale." This provision applies only to the newsstand and gift shop and does not apply to the restaurant. In addition to the space for the restaurant, Dobbs Houses, Inc. also leases space wherein it conducts a snack bar, a newsstand and a gift shop. The lease imposes various requirements upon the lessee, but nowhere does it give the city the right to control the operation of the restaurant.

The right of the city in the event of default is to cancel the lease.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this cause by virtue of the provisions of Title 28, U.S.C., § 1343 and Title 42, U.S.C., § 1983.

2. This Court is bound by the decisions of the Supreme Court of the United States and by the decisions of the United States Court of Appeals for the Fifth Circuit.

3. When a provision of the Constitution or a law has been construed or declared by either the Supreme Court of the United States or the Court of Appeals for this circuit, this Court is not thereafter free to construe or declare such provisions of the Constitution or law differently even though this Court should believe it should be differently construed or declared, but is bound by the decisions of such courts.

4. The complaint states a proper case for class action. The suit is one for interference with plaintiff's alleged rights as a Negro citizen and he may properly sue on behalf of all other Negro citizens since they all have an identity of interest in having access to the restaurant on a nonsegregated basis. *Evers v. Dwyer*, 358 U.S. 202; *Sharp v. Lucky*, 5 Cir., 252 F.2d 910, 913; *Derrington v. Plummer*, 5 Cir., 240 F.2d 922.

5. The decisive question presented here is:

Whether the action of the lessee, Dobbs Houses, Inc., may fairly be said to be the conduct of the City of Atlanta and thus state action.

6. If this question is answered in the affirmative, it is under the teaching of *Ex Parte, Commonwealth of Virginia*, 100 U.S. 339, 347, 25 L.Ed. 676, state action inhibited by the first section of the Fourteenth Amendment.

7. If this question is answered in the negative, then the action of Dobbs Houses, Inc. is merely private conduct and however discriminatory or wrongful it may be is not action inhibited by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 13; *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845.

8. The defendant, City of Atlanta, contends that the municipality in owning and operating the municipal airport was acting in a proprietary capacity and not in a governmental capacity and that its acts are not state action.

This question has been decided adversely to this defendant's contention by the United States Court of Appeals for the Fifth Circuit in *City of St. Petersburg v. Alsop*, 238 F.2d 830.

9. The defendants further contend that the city had executed to Dobbs Houses, Inc. a valid lease to the space in the Atlanta Airport Termi-

nal where the restaurant is operated with no purpose of discrimination, no joinder in the enterprise or reservation of control by the city, and that the acts of Dobbs Houses, Inc. are not the acts of the City of Atlanta, but is merely private conduct of Dobbs Houses, Inc., a private corporation.

This question has seemingly been decided adversely to the defendants' contentions by the United States Court of Appeals for the Fifth Circuit in the case of *Derrington v. Plummer*, 240 F.2d 922, 925(4).

10. It is the contention of the defendants however, that under the facts here, this case comes within the exception recognized in *Derrington v. Plummer*, supra, wherein the court in that case said:

"No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."

Assuming no purpose of discrimination on the part of the city here and further assuming no joinder in the enterprise and no express reservation of control by the terms of the lease, in order to bring this case within the above quoted exception in *Derrington v. Plummer*, supra, this Court must find that the leased space was not used or needed for city purposes.

The lease contract itself describes the space leased to Dobbs Houses, Inc. referred to as "restaurant concession" as being "... certain space on the first floor of the new terminal building located on the above described municipal airport ... for the conduct, operation and maintenance of a dining room, kitchen, storeroom, etc. ...".

[*Derrington v. Plummer*]

In *Derrington v. Plummer*, supra, the Court said:

"... the basement of the courthouse can by no means be termed surplus property not used nor needed for County purposes.

To the contrary, the courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could countenance the diversion of such property to a purely private use.

"Further, the express purpose of the lease was to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through the instrumentality of a

lessee; and in rendering such service the lessee stands in the place of the County. His conduct is as much state action as would be the conduct of the County itself."

11. Under the facts in this case the Court holds that the conduct of Dobbs Houses, Inc. is as much state action as would be similar conduct of the City of Atlanta itself and that the discrimination practiced by Dobbs Houses, Inc. in refusing to serve Negroes except upon a segregated basis is violative of plaintiffs' rights as a Negro citizen under the equal protection provision of the Fourteenth Amendment. Plaintiff is entitled to the injunctive relief as prayed.

A judgment in conformity with the findings and conclusions here made may be prepared and presented.

This the 5th day of January, 1960.

GOVERNMENTAL FACILITIES

Arenas—Virginia

Harry A. REID, et al. v. CITY OF NORFOLK, VIRGINIA et al.

United States District Court, Eastern District, Virginia, Norfolk Division, January 12, 1960, 179 F. Supp. 768.

SUMMARY: Negro resident-taxpayers of Norfolk, Virginia, attending a function at a city-owned arena, were ordered by an usher and a policeman to comply with state mandatory segregated seating statutes by changing their seats to that part of the arena reserved for members of their race, or to leave the arena or be subjected to arrest if they refused to move. They left without arrest or forcible ejection, but subsequently brought a class action in federal district court against the city and certain of its officials, seeking a declaration of their rights and injunctive relief to restrain the enforcement of the statutes. Defendants admitted racial segregation of arena seats under color of law, policy, custom, usage and the challenged statutes, and their intention to continue such practice in compliance with those statutes. The three-judge court refused to issue an injunction, stating that it was not now prepared to say that enforcement of the statutes at a recreational function was so flagrant and discriminatory and of such "immediate" interest as to constitute irreparable injury requiring federal court injunctive interference with state criminal statutes, especially where plaintiffs have an appropriate remedy in state courts by way of declaratory judgment. The court also noted that actions are pending in state courts in which the statutes' constitutionality is attacked, remarking that state courts inevitably would ultimately determine the constitutional issue. Observing that principles of comity should be adhered to in order "to avoid any hazard of disrupting federal-state relations in a field already disturbed by friction," the court stated that to require plaintiffs to pursue their remedies in the state court "is at best a slight sacrifice" which must yield to comity principles where irreparable damage is not clearly shown to be immediate. However, defendants' motion to dismiss was denied, and the case was retained on the

docket, jurisdiction being postponed and further proceedings stayed for 60 days to enable plaintiffs, if they wish, to bring a state court declaratory judgment action; and after a decision there on the merits, the present proceedings would be further stayed until such time as the parties have exhausted the remedies available through state channels, including a petition for certiorari to the United States Supreme Court.

Before SOBELOFF and HAYNSWORTH, Circuit Judges, and HOFFMAN, District Judge.

HOFFMAN, District Judge.

In this class action plaintiffs seek a declaration of their rights and injunctive relief to restrain the enforcement of § 18-327 and § 18-328 of the Code of Virginia, 1950. The language of the two statutes appears in the footnote¹ but, for brevity, they may be denominated as mandatory segregated seating statutes.

1. "§ 18-327. DUTY TO SEPARATE RACES AT PUBLIC ASSEMBLAGE.

Every person, firm, institution or corporation operating, maintaining, keeping, conducting, sponsoring or permitting any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons shall separate the white race and the colored race and shall set apart and designate in each such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage certain seats therein to be occupied by white persons and a portion thereof, or certain seats therein, to be occupied by colored persons and any such person, firm, institution, or corporation that shall fail, refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense.

"§ 18-328. FAILURE TO TAKE SPACE ASSIGNED IN PURSUANCE OF PRECEDING SECTION.

Any person who fails, while in any public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, to take and occupy the seat or other space assigned to them in pursuance of the provisions of the preceding section by the manager, usher or other person in charge of such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage or whose duty is to take up tickets or collect the admission from the guests therein, or who shall fail to obey the request of such manager, usher, or other person, as aforesaid, to change his seat from time to time as occasion requires, in order that the preceding section may be complied with, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than twenty-five dollars for each offense. Furthermore such person may be ejected from such public hall, theatre, opera house, motion picture show or other place of public entertainment or public assemblage, or by a police officer or any other conservator of the peace, and if such person ejected shall have paid admission into such public hall, theatre, opera house, motion picture show or other place of public entertainment or public assemblage, he shall not be entitled to a return of any part of the same."

These statutes have existed for many years and are not the product of resistance efforts of recent date.

The facts may be briefly stated. The four plaintiffs are citizens, residents and taxpayers of the City of Norfolk and State of Virginia. Three of the plaintiffs are Negroes. One (Abbot) is a white person.² The defendant, City of Norfolk, owns and operates the Norfolk City Arena and Center Theatre and, on occasions, leases the facilities in question to various private persons and public organizations for recreational functions, public assemblages, etc. The Mayor, City Manager, Director of Public Safety, Director of Public Works, Manager of the Arena and Center Theatre, as well as the Governor of Virginia, have been named parties defendant to this action but, as we view it, it is unnecessary to discuss the relationship of these parties to the controversy, although, by their answer, defendants admit that the City Manager has control of this occupancy of the Arena and Theatre and the City Manager has delegated the renting of said facilities to the Director of Public Safety to the extent permitted by § 34-9 of the Code of the City of Norfolk, Virginia, 1950.

[Admissions by Defendants]

Defendants admit that, under color of law, policy, custom and usage, and especially by virtue of § 18-327, § 18-328 of the Code of Virginia, 1950, they have segregated, and required the segregation of, persons by race in all public gatherings held in the Arena and Theatre for a period of years, and that they are now requiring such segregation. They further state that they will continue such compliance with the state law. They insist, however, that plaintiffs and the class they represent have not

2. The action was instituted on May 13, 1959. On the following day the white plaintiff (Abbot) filed his motion to withdraw as a party plaintiff. At a pre-trial conference before the resident judge on June 18, 1959, the motion was granted with the concurrence of counsel.

suffered, nor will they in the future suffer, irreparable harm, damage and injury.³

From the allegations of the complaint which, for the purpose herein stated we accept as true, the four plaintiffs purchased, on December 15, 1958, tickets allowing them to attend a function being held at the Arena. They took the seats designated by the purchased tickets. Within a matter of minutes the plaintiffs were ordered by an usher and police officer to change their seats to that part of the Arena reserved for members of the respective races or, in the alternative, to leave the Arena or be subjected to arrest if they refused to move. The usher and police officer advised plaintiffs that they were relying upon the state law prohibiting members of both races from being seated alongside each other. The plaintiffs then left the Arena; no arrests were made; nor were plaintiffs forcibly ejected. It is further alleged, but not admitted, that like incidents have occurred at other times and places under like circumstances, but no specific instances have been mentioned.

[Motion to Dismiss]

The defendants have filed a motion to dismiss alleging, in substance, that a three-judge district court should not exercise jurisdiction for (1) the action is to restrain the enforcement of certain state criminal statutes, (2) this is not a case involving clear and imminent irreparable injury which would justify the interference by a federal court in the exercise of discretionary equity powers, (3) no actual controversy exists, and (4) the state courts should initially be given an opportunity to pass upon the validity of the controverted statutes in light of the many decisions pronounced since *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and other related cases.

The request for an injunction restraining the enforcement, operation or execution of a state statute is a prerequisite for action by a three-judge district court. 28 U.S.C.A. § 2281. As a corollary to such action, there must be shown that plaintiffs will sustain irreparable injury which is clear, imminent and substantial, unless relief is granted. We are not prepared to say at this time that the enforcement of mandatory segre-

gated seating statutes at recreational functions is essentially of "immediate" interest so as to constitute irreparable injury requiring the interference by a federal court by way of injunction restraining the enforcement of criminal statutes enacted by the Commonwealth of Virginia. More especially is this true where it appears that plaintiffs have an appropriate remedy in the state court by way of declaratory judgment under §§ 8-578 to 8-585 of the Code of Virginia, 1950, in which parties are entitled to a declaration of rights⁴ in proper cases.

[Decisions Remembered]

We are not unmindful of the decisions of federal courts in public school cases, the public bus transportation cases, and matters involving the outright denial to Negroes of entrance to, or admission in, public places owned, operated or leased by governmental authorities with funds provided by taxpayers, such as parks, golf courses, bathing beaches, etc. The public school cases furnish abundant evidence of irreparable injury. Similarly, the public transportation cases strike at the right to earn a means of livelihood⁵ and the ability to go from place to place, where again immediate irreparable injury is clearly established. In absolutely denying the right of the member of one race to enter property owned, operated or leased by governmental authorities, the denial may be so flagrant and discriminatory as to compel action to prevent imminent irreparable damage by the continuance of such practices. The matter now before us does not present such a situation.

Indeed, it may be that this controversy would not call for a three-judge district court in any event, for, if the statutes are plainly unconstitutional and require no state court interpretation, jurisdiction may exist in the regularly constituted district court. The exercise of jurisdiction by a single judge would, however, still be discretionary, and plaintiffs would again be confronted with the problem of irreparable injury and in-

3. In argument before this Court on preliminary matters, it was conceded that defendants have "closed their eyes" to alleged violations which have existed with respect to public assemblages such as preaching missions, political gatherings, as well as all private functions.

4. The venue for such action lies in the City of Norfolk unless plaintiffs elect to name the Governor as a party defendant, in which event the suit must be instituted in the City of Richmond. § 8-579(8), § 8-38(9), Code of Virginia, 1950.

5. In *Dorsey v. State Athletic Commission*, 168 F. Supp. 149, motion to affirm granted, 359 U.S. 533, 79 S.Ct. 1137, 3 L.Ed.(2d) 1023, a three-judge district court held unconstitutional on its face a statute which prohibited athletic contests between Negroes and whites, where plaintiff was a professional prizefighter.

junctive relief restraining the enforcement of state criminal statutes. Assuming that no injunctive relief is demanded, it does not follow that a federal court must exercise equitable powers in all cases, where yielding to the principles of comity would not essentially deprive the litigants of rights which could be asserted and determined by a state court within a reasonable period of time. Cf. *Dawley v. City of Norfolk, Virginia*, 4 Cir., 260 F. (2d) 647, cert. den. 359 U.S. 935, 79 S.Ct. 650, 3 L.Ed.(2d) 636.

[Enjoinability of State Criminal Actions]

For many years it has been an established principle of law that courts of the United States have no power to enjoin state officers from instituting criminal actions *unless* (1) it is absolutely necessary for protection of constitutional rights, and (2) extraordinary circumstances exist where the danger of irreparable loss is both great and immediate. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; *Fenner v. Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927; *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322; *Beal v. Missouri Pacific R. Corp.*, 312 U.S. 45, 61 S.Ct. 418, 85 L.Ed. 577; *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971; *Watson v. Buck*, 313 U.S. 387, 69 S.Ct. 962, 85 L.Ed. 1416; *Douglas v. Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324; *Stefanelli v. Minard*, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138.

It is argued that the doctrine pronounced in the foregoing cases has been implicitly overruled by later decisions involving public transportation in which federal court intervention was sought. *Evers v. Dwyer*, 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed.2d 222; *Browder v. Gayle*, 142 F. Supp. 707, affirmed without opinion, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114; *Morrison v. Davis*, 5 Cir., 252 F.2d 102, cert. den. 356 U.S. 968, 78 S.Ct. 1008; 2 L.Ed.2d 1075. Our attention is also directed to *Crown Kosher Super Market of Mass., Inc. v. Gallagher*, 176 F.Supp. 466, in which it is said that a three-judge district court may not decline, as a matter of discretion, to take jurisdiction of an action to enjoin the operation of a state criminal statute resulting in the denial of civil rights of a citizen where state officials intend to enforce the statute unless and until its constitutionality has been finally adjudicated.⁶

6. Compare *Williams v. Dalton*, 6 Cir., 231 F.(2d) 646, 648, an opinion by Circuit Judge Stewart, now a member of the United States Supreme Court,

As indicated, *Crown Kosher* falls within the class of cases touching upon the right of a citizen to earn a means of livelihood. While we are in complete accord with the view that one should not be required to subject himself to the embarrassment of an arrest as a prerequisite to testing his constitutional rights, we nevertheless feel that, in this proceeding, where plaintiffs may resort to an efficient legal remedy by way of a declaratory judgment proceeding in the state court, there is no clear showing of extraordinary circumstances indicating great and immediate danger of irreparable loss which justifies the intervention of a three-judge district court. Furthermore, the Supreme Court has been confronted with an opportunity to expressly overrule the line of cases restricting the power of federal courts from enjoining state officers in enforcing state criminal statutes where civil rights are involved, but has failed to take such action. Without a definitive solution of these contentions, we think sufficient discretion is left us to defer action where there is a procedure available for the prompt and orderly determination of the constitutionality of the statutes in the civil courts of Virginia.

[NAACP v. Bennett Relied Upon]

Plaintiffs rely upon the brief statement in *N.A.A.C.P. v. Bennett*, 360 U.S. 471, 79 S.Ct. 1192, 3 L.Ed. (2d) 1375, as authority for the proposition that a reference by a federal district court to a state court should not be *automatically* made where the validity of a state statute, challenged under the United States Constitution, is *properly* before a United States District Court. We do not believe that *Bennett* is applicable as the issue of irreparable damage was not considered—indeed, the district court apparently assumed that the danger of irreparable loss was both great and immediate.

Our attention is directed to the fact that the constitutionality of the statutes under attack is, of recent date, the subject of state court action. On January 13, 1958, the Circuit Court of Arlington County, Virginia, held that § 18-327 of the Code of Virginia, 1950, was unconstitutional.⁷ There is now pending in the same court a declaratory judgment action in which the constitu-

wherein it is said that "accepted principles governing equitable and declaratory relief are no less applicable where such relief is sought under the Civil Rights Act."

7. *Commonwealth v. Taylor*, Crim. No. 2024.

tionality of §§ 18-327, 18-328 is directly challenged.⁸ Moreover, in *Bissell v. Commonwealth*, 199 Va. 397, 100 S.E. (2d) 1, the Supreme Court of Appeals of Virginia, in a similar case, found that the warrant of arrest was defective in that it did not properly charge a crime and, for this reason, the highest court in Virginia did not reach the constitutional question. It is inevitable, however, that the state courts will ultimately determine the constitutionality of these statutes. To adhere to the principles of comity would avoid any hazard of disrupting federal-state relations in a field already disturbed by friction. As was said by Mr. Justice Black in *Watson v. Buck*, *supra*:

"Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if the statutes are unconstitutional."

[Extent of Judicial Review]

We note in passing that the United States Supreme Court maintains the same right, and observes the same duty, to review a decision of the highest court of a state as it does in considering the actions of a federal court. It is equally the duty of a state court to protect the rights of its citizens arising under the Constitution of the United States. To require these plaintiffs to pursue their remedies in the state court on the issues here involved is, at best, a slight sacrifice which must yield to the principles of comity where irreparable damage is not clearly shown to be immediate.

We will deny defendants' motion to dismiss

8. *Community Council for Social Progress v. E. J. Braun, et al.*, Chancery No. 9886, argued October 13, 1959.

and retain the case upon the docket, postponing the exercise of jurisdiction to enable plaintiffs, should they be so advised, to institute an action in the state court for declaratory judgment, in which proceeding we assume that defendants will cooperate, to obtain a prompt decision of the merits if the case is properly presented. At the time of argument, and in the brief, defendants abandoned the contention that no actual controversy exists under the state of facts here presented; we assume that defendants will make a like concession in the state court. To appropriately test the constitutionality of the statutes in a civil court of Virginia, we see no necessity of plaintiffs being required to subject themselves to criminal process, but if the decision is grounded upon this point, we may then entertain a motion to exercise jurisdiction.

[Provisions of Order]

An order will be entered staying further proceedings herein for a period of sixty (60) days to enable the plaintiffs, and the class they represent, to institute an appropriate action in the state court. If no action is taken by the plaintiffs within said period of sixty (60) days, this cause will stand dismissed with costs awarded to defendants. If the issue is properly presented and there is a decision on the merits in that case, these proceedings will be further stayed until such time as the parties have exhausted their remedies available through state channels, including, if necessary, an application for certiorari to the Supreme Court of the United States. If such an action is properly instituted by the plaintiffs, but it should appear that the constitutionality of the statutes will not be determined therein, this court will then consider what further action may be appropriate.

Counsel for defendants will prepare and present order.

GOVERNMENTAL FACILITIES

Parks—Texas

Joseph R. WILLIE, Hugh H. Ford, Lee O. Mosely, and D. Farris Barclay v. HARRIS COUNTY, TEXAS, Bill Elliott, W. Kyle Chapman, V. V. Ramsey, Phillip E. Sayers, and E. A. Lyons.

United States District Court, Southern District, Texas, Houston Division, February 9, 1960, Civil Action No. 11, 926.

SUMMARY: Four Harris County, Texas, Negroes brought a class action in a federal district court for declaratory and injunctive relief to restrain the county commissioners from con-

tinuing an alleged policy of discrimination against members of the Negro race respecting public use of a county owned and administered beach park, in violation of their rights under the Fourteenth Amendment and the Civil Rights Acts. The court found that plaintiffs had applied for and been denied admission to the park by a park employee on only one occasion and that they had never sought permission to use the park from the park officers or county officials. Evidence was also noted that no one had ever requested the commissioners to integrate the park. Plaintiffs claimed that the court had jurisdiction and that they had a right to immediate relief without the necessity of having first filed a petition or made demand upon the commissioners, because it would be "the ultimate in racial discrimination" to hold that Negroes must formally petition for use of the park while all others could use it without petitioning. However, the court held that a deprivation of rights had not been so clearly established as to warrant immediate relief without exhaustion of administrative remedies, and stated that the fact that persons "must on occasion petition and persuade their Government to change its laws or policies is not a deprivation of civil liberties" but "the essence of representative government." Inasmuch as the alleged deprivation arose out of a single incident provable only by disputed circumstantial evidence, and there was nothing to indicate that a petition by plaintiffs to make the desired use would not be received and acted on in good faith by defendants (perhaps with the result that the relief requested would be granted or, if refused, that the facts would be clearly defined so that the court might find a clear deprivation of rights), the court held the action to have been prematurely brought and in its discretion decided not to exercise its equitable powers at that time. However, jurisdiction was retained for a reasonable time to give plaintiffs an opportunity to exhaust their administrative remedies and to allow them thereafter to bring such further proceedings as might be proper.

INGRAHAM, District Judge.

Action for declaratory judgment and permanent injunction to restrain defendants from continuing an alleged policy of racial segregation and discrimination against the negro race respecting public use of Sylvan Beach Park, a recreational facility owned and administered by defendant Harris County. The cause proceeded to trial before the court and is submitted for judgment upon briefs of the parties.

[Plaintiffs' Contentions]

Plaintiffs, four Negro adults, contend that defendants, the County Judge and Commissioners constituting the Commissioners Court of Harris County, Texas, are depriving them of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. To redress this alleged deprivation they invoke the equitable jurisdiction of this court under Title 28, United States Code, Sections 1331 and 1343. They maintain that they are being denied the free and unfettered use on a basis equal with persons of the white race of Sylvan Beach Park, solely on the basis of race or color, in violation of the Fourteenth Amendment of the Constitution and Title 42, United States Code, Sections 1981 and 1983, formerly Title 8, United

States Code, Sections 41 and 43. They claim an immediate right to relief, asserting that no petition need be filed nor demand made upon the Commissioners Court before a federal court can take jurisdiction of their cause. Beyond their alleged refusal of admittance to Sylvan Beach Park by a gate attendant, they do not allege or prove an appeal for admittance to the Director of said park, to the Park Commission, or to defendant members of the County Commissioners Court.

[Defendants' Contentions]

Defendants contend that this court lacks jurisdiction to entertain this action. They would show that Harris County is a political subdivision of the State of Texas under Article 11, Section 1, of the Constitution of the State of Texas; that the other defendants comprise the Commissioners Court of Harris County, Texas, a court of record established by Article 5, Sections 1 and 18 of said constitution; and that said court is also the legislative body of and for Harris County. If defendants have acted in a judicial capacity in depriving plaintiffs of their rights, defendants maintain that a federal court does not have jurisdiction of an action against members of a state court for alleged acts under color of their

respective offices in depriving plaintiffs of equal protection of the laws. If defendants have acted in a legislative or quasi-legislative capacity, they claim that a federal court should not adjudicate the constitutionality of a state enactment until the state courts have been afforded a reasonable opportunity to pass upon it. If defendants have acted in an administrative capacity, they contend that plaintiffs by their own admission have not exhausted their administrative remedies, having made no application or appeal to the Park Director, the Park Commission, or the County Commissioners Court. They argue that plaintiffs have failed to show that defendants, collectively, singularly, or through an authorized agent, have deprived plaintiffs of any rights, privileges, or immunities secured by the Constitution and laws of the United States providing for equal rights of all persons under color of any state law, statute, ordinance, regulation, custom, or usage. They challenge plaintiffs' allegation that they represent a class entitled to bring an action under Rule 23.

[Findings of Fact]

The court finds the facts to be as follows. On a Sunday afternoon, May 25, 1958, plaintiffs Willie, Ford, Mosely and Barclay, who are residents, property owners, and taxpayers of Harris County and persons of the Negro race, went to Sylvan Beach Park, a recreational facility owned and administered by Harris County, Texas, for the purpose of swimming and fishing. They placed their car in a line of cars entering the park through the only entrance. A man in a khaki uniform, standing at the gate, was stopping and collecting a parking fee from the cars ahead. He was in possession of parking stubs and was giving them to persons in the other cars. Plaintiff Willie, the driver of the car in which the other plaintiffs were riding, offered the amount of said fee to the man. This person may have worn a badge and represented that he was employed by Harris County. Plaintiffs contend that the man was a gate attendant and agent of defendants. The alleged attendant refused to accept plaintiffs' tendered fee and to admit them to the park on the ground that the park was segregated and only open to persons of the white race. He stated that they would be able to use the park on June 19 and that at that time the park would be segregated against persons of the white race. Plaintiffs were con-

ducting themselves with propriety; they left when refused admittance.

[Use for Private Parties]

The evidence discloses and the court further finds that Sylvan Beach Park was used on more than one occasion for private parties, attended by plaintiffs, and that no one was allowed admittance to such parties who was not an invited guest, colored or white. Each plaintiff has testified that he has, on occasion, attended private dances at Sylvan Beach Park when the facilities were engaged in advance but that on such occasions, only negroes were in attendance. Plaintiff Willie testified that he had been there for two or three private dances and that on such occasions a sign was posted, reading "Private Dance, Colored." Plaintiffs testified that no sign was displayed on May 25, 1958. Plaintiffs did not know and could not testify that there was not a private party in progress on Sunday afternoon, May 25, 1958. Plaintiffs admit though that they know of no other act of segregation allegedly performed by defendants in connection with Sylvan Beach Park at any time, either prior to or subsequent to the filing of this action.

[Official Permission Never Sought]

The court further finds that none of the plaintiffs had ever appealed to or sought permission to use Sylvan Beach Park from the Park Director thereof, the Park Commission, or the Commissioners Court. Plaintiff Barclay however had been a member of a committee that had approached the Park Director to secure the park for a private dance. Sylvan Beach Park is a recreational facility owned and administered by Harris County. The Park Director thereof is under the supervision of the Commissioners Court of Harris County. Defendant Elliott, the County Judge, testified that no official action has been taken on the admittance of colored and white persons to the park at the same time and, to his knowledge, he did not know whether Sylvan Beach is operated on a segregated or integrated basis. Defendant Chapman, the County Commissioner more closely associated with the operation of the park, testified however that the park was used as a segregated facility of the county on May 25, 1958, though there is no official, affirmative policy of the Commissioners Court on that subject. Though they were aware that this action was pending, defendants Elliott

and Chapman testified that no one, at any time or under any circumstances, had ever requested the Commissioners Court that the park be integrated or that colored people be allowed to go there at the same time as white people.

[Jurisdiction Considered]

The court will consider the question of its jurisdiction over this action. It will be noted that the court stated at the trial of this cause its reasons for denying defendants' motion to dismiss for want of jurisdiction, namely, that the case required full development of the evidence. It is not believed that plaintiffs were prejudiced by this interim ruling.

The status of the Commissioners Court of Harris County as a judicial, legislative or administrative body need not be determined for purposes of this case. It is enough to observe that the Commissioners Court possesses attributes pertaining to all three governmental functions, though the operation of Sylvan Beach Park probably lies within the administrative responsibilities of the court. Under Article 5, Section 18, of the state constitution the County Commissioners Court is authorized to exercise such powers and jurisdiction "over all county business" as conferred by the constitution and laws of the state.

[Administrative Remedies Exhausted?]

Defendants contend that plaintiffs, by their own admission, have not exhausted their administrative remedies, having made no application or appeal to the Park Director, the Park Commission, or the County Commissioners Court. Defendants have not shown, however, any specific administrative remedy or procedure that plaintiffs might be required to utilize before seeking jurisdiction of this court. Article 1573, Vernon's Annotated Texas Statutes, cited by defendants in their motion to dismiss, seems applicable to presentation of monetary claims, rather than to suits for injunction against illegal county action where no damages are involved.

[Precedents Considered]

It is true that most of the cases requiring exhaustion of state administrative remedies before a federal court can take jurisdiction involve a clear and adequate procedure under state law,

which plaintiffs have failed to pursue. *Carson v. Board of Education of McDowell County*, 4 Cir., 1955, 227 F.2d 789; *Carson v. Warlick*, 4 Cir., 1956, 238 F.2d 724, cert. denied, 1957, 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed. 2d 664; *Covington v. Edwards*, 4 cir., 1959, 264 F.2d 780; *Thomas v. Chamberlain*, E.D. Tenn., 1955, 143 F.Supp. 671, affirmed, 236 F.2d 417. Where a deprivation of rights has been clearly established, other cases have not required exhaustion of state administrative remedies where no state administrative agency exists with jurisdiction or authority to determine the constitutional questions involved, where the administrative procedure provided is not a reasonable remedial process, or where a pure question of law is involved. *Bruce v. Stilwell*, 5 Cir., 1953, 206 F.2d 554; *Borders v. Rippey*, 5 Cir., 1957, 247 F.2d 268; *Thompson v. County School Board of Arlington County*, E.D. Va., 1957, 159 F.Supp. 567, affirmed, 252 F.2d 929.

[Precedents Distinguished]

These precedents can be distinguished, however, from the case at bar in which no clearly established, admitted, or undisputed deprivation of rights has been presented by plaintiffs which might warrant immediate relief without exhaustion of administrative remedies. The alleged deprivation of rights arose out of a single incident, provable only by circumstantial evidence, which is disputed by defendants. Plaintiffs have not appealed to or sought permission from the Park Director, the Park Commission, or the County Commissioners Court to use Sylvan Beach Park as they desire, though they knew that these authorities were in charge of its operation. Defendants' position regarding segregation or integration of the park is not established by any official action or affirmative policy. Apparently the question of segregation or integration has never been presented to defendants regarding Sylvan Beach Park. There is no indication that a petition, application, or appeal for permission to use the park as plaintiffs desire would not be received by defendants and acted upon in good faith. If they had consulted these authorities, plaintiffs might have obtained the relief here requested or, at least, would have so defined the facts through defendants' refusal to grant their petition that the court might find a clear deprivation of rights.

[Federal Court's Equitable Discretion]

In exercise of its equitable powers, a federal court has discretion when, in a matter of equity jurisdiction, the balance is against the wisdom of using its power. *Stefanelli v. Minard*, 1951, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138. Weighing the considerations in the case at bar, the court is more persuaded by cases that require plaintiffs to pursue their administrative remedies where they have made no effort to follow them. In *Davis v. Arn*, 5 Cir. 1952, 199 F.2d 424, plaintiffs sought redress of an alleged deprivation of rights consisting of the refusal of a state personnel board to permit plaintiffs to take competitive examinations for positions as policemen and firemen solely because of their race and color. To whom plaintiffs applied for application blanks and by whom they were refused the privilege of taking the examination was not specifically alleged; nor was it alleged that plaintiffs in any way attempted to redress administratively the alleged wrongful refusal. Affirming the ruling below, our court of appeals held that plaintiffs' resort to a federal court was premature, since they had not appealed to the administrative authority in charge of the examination. "We can not assume that if plaintiffs has pursued that remedy they would have been denied the relief to which they were entitled," the court stated. "The presumption is the other way." *Davis*, supra, pg. 425. Cf. *Peay v. Cox*, 5 Cir., 1951, 190 F.2d 123; *Cook v. Davis*, 5 Cir., 1949, 178 F.2d 595.

[Discrimination Argued]

Plaintiffs contend that "it would be the greatest deprivation of civil liberties, the ultimate in racial discrimination, to hold that Negroes must formally petition for the use of Sylvan Beach Park, whereas all other citizens may use this facility without such petition." The right of the people peaceably to assemble and to petition their Government for a redress of grievances is a fundamental right protected by the Fourteenth Amendment of the Constitution against deprivation by state action. *Douglas v. City of Jeannette*, 1943, 319 U.S. 157 at 162, 63 S.Ct. 877, 87 L.Ed. 1324. The founding fathers of our country did not consider themselves deprived of their rights merely because they had to petition their government for them. They protested and petitioned through every conceivable avenue. They did not require a statutory or administrative procedure

to bring their complaints before their elected representatives. A right may be waived by failure to assert it. Today, surely not a week goes by but what residents and taxpayers of Harris County petition their Commissioners Court, requesting consideration of a wide variety of problems. That our people must on occasion petition and persuade their Government to change its laws or policies is not a deprivation of civil liberties; it is, in fact, the essence of representative government.

[A Procedure Commended]

The court commends to the parties the procedure by which the issue of deprivation of similar rights was presented in *Moorhead v. City of Fort Lauderdale*, S.D.Fla., 1957, 152 F.Supp. 131, affirmed, 248 F.2d 544. Shortly before the institution of that suit the Negro plaintiffs, residents of the City of Fort Lauderdale, petitioned the Fort Lauderdale City Commission for permission to use the facilities upon a golf course, owned and operated by the city, upon the same conditions and terms as persons of the white race. Pursuant to said petition the City Commission appointed a committee composed of white and Negro members to consider the petition and make recommendations. After considerable deliberation the City Commission passed a resolution concluding that negro citizens would be denied admission "until the issues can be determined by the courts." After passage of the resolution plaintiffs went to the golf course and were refused permission to use the course on the sole ground that they were negroes. At the trial defendants offered no testimony or other evidence to rebut or contradict any of the above facts.

By this procedure the facts constituting a deprivation of rights were clearly established through the cooperation of all parties in the process of local government. Defendants could not claim that plaintiffs had not exhausted their state administrative remedies. A legal question was framed of which a federal court could take immediate jurisdiction, since state judicial remedies would not have to be exhausted. *Lane v. Wilson*, 1939, 307 U.S. 268 at 274, 59 S.Ct. 872, 83 L.Ed. 1281.

[Jurisdiction Retained]

The action is brought prematurely but will not be dismissed for want of jurisdiction at this

time. Rather, the case will pend a reasonable time before the court to give plaintiffs an opportunity to exhaust their administrative remedies; thereafter such further proceedings may be had as shall then appear to be proper. This proce-

dure was approved by our court of appeals in *Peay v. Cox* and *Cook v. Davis*, supra.

True copies hereof will be forwarded by the clerk to the attorneys of record.

GOVERNMENTAL FACILITIES Theaters—Maryland

Linwood A. JONES, Jr., Weldon W. Christopher, and Donald K. Lyles v. MARVA THEATRES, INC., and the City of Frederick.

United States District Court, District of Maryland, January 5, 1960, 180 F.Supp. 49.

SUMMARY: Three Negroes brought an action in federal court for an injunction against segregated seating or other discrimination in an opera house, owned by the city as part of the city hall of defendant city of Frederick, Maryland, but leased to a co-defendant private motion picture theater operator from October 1, 1950 to September 30, 1960. The lease terms expressly contemplated segregated facilities, included regulations as to when the theater should be operated and what types of shows could be presented; and reserved the right in the city to use the opera house or to grant its use to others four days a year. Because the theater operator maintained segregated seating and toilet facilities, plaintiffs were denied admission to the first floor of the opera house on a certain date. After a hearing, the court suggested, and plaintiffs and the city agreed, that the case be disposed of by an agreement that any lease after September 30, 1960, would prohibit discrimination and that in the meantime plaintiffs would refrain from pressing their claimed rights. However, the theater operator refused to concur, and, instead, sought release from its opera house lease and purchased another theater which it proposed to operate after the beginning of the year 1960. Plaintiffs then withdrew their offer to settle and insisted on a decree in the court action. The court, in holding that the practices here complained of violated the Fourteenth Amendment, relied upon federal court decisions that the right of all citizens to use public facilities without racial discrimination cannot be abridged by leasing them to private operators, with ownership retained by the state. The city having stood by its agreement, the court declined to enter an injunction against it, but enjoined the theater operator from further discrimination on the property leased from the city. The court also refused to enjoin the city from permitting the use of the opera house on any occasion by religious, social, or fraternal groups for private meetings.

THOMSEN, Chief Judge.

In this action Negro plaintiffs seek an injunction against segregated seating arrangements or any other kind of discrimination in a theatre, owned by the City of Frederick, Md., part of the City Hall building, on city-owned property, but leased to Marva Theatres, Inc. (Marva), a private motion picture theatre operator.

The theatre, known as the City Opera House, was built in 1875 as a place of public assembly. The same entrance serves the City Hall and the Opera House. Since 1927 the Opera House has

been leased to private motion picture theatre operators. The term of the current lease, which was made after competitive bidding, is from October 1, 1950 to September 30, 1960. As part of the lease agreement Marva made substantial repairs and improvements.

No state or local law requires or prohibits segregation in theatres, and the lease contains no specific provision with respect thereto. However, the lease includes furniture, equipment and certain facilities which are described in the exhibit attached to the lease as "box office", "col-

ored box office", "men's toilet", "colored men's toilet", "ladies' toilet", and "colored women's toilet".

The lease provides that the theatre shall be operated not less than six afternoons and nights a week, despite the fact that it is not a percentage lease, and limits the type of shows which may be presented. The City of Frederick reserved the right to use the Opera House or to grant its use to others four days a year. This privilege is generally exercised, and free use of the Opera House has been granted to various social, educational and other organizations.

[Section Reserved for Negroes]

Marva operates the City Opera House as a motion picture theatre open to the public seven days a week. It does not now maintain a racially segregated box office, but does maintain racially segregated seating and toilet facilities. It reserves the first floor of the main auditorium and the front of the balcony exclusively for white persons; the back rows of seats in the balcony are set aside exclusively for Negro patrons. The decision as to the seating arrangements was made by Marva's president, carrying out the policy which had prevailed there for some time. He felt it was the only policy he could profitably pursue. A similar policy has been followed for several years by the Tivoli Theatre, the only other theatre operating in the city.¹

Plaintiffs are Negroes, bacteriologists, residents of Frederick, and are employed at Fort Detrick on the edge of the City.

On or about March 10, 1958, they were refused admission to the first floor of the main auditorium of the Opera House solely because of their race. They were directed by Marva's employees to the section of the balcony which is set aside exclusively for Negro patrons.

If the plaintiffs or any other Negroes were again to present themselves for admission to the first floor of the main auditorium of the Opera House, Marva would refuse to admit them to that section for the sole reason that they are Negroes.

The City of Frederick has desegregated all public facilities under its control, but it took the position at the hearing that the existing lease gave it no authority to dictate to Marva, one way or the other, what the seating arrangements in the theatre should be.

1. A third theatre is presently closed and is probably unusable without major repairs.

[Agreement Suggested]

In view of these facts, at the conclusion of the hearing, I inquired of counsel whether it might be possible to dispose of the case by an agreement of the parties that any lease of the theatre for a term beginning after September 30, 1960, should contain a provision against discrimination, and that in the meantime the plaintiffs would refrain from pressing their claimed rights. The plaintiffs and the N.A.A.C.P., which has been supporting their suit, agreed to such a disposition, if promptly made and supported by an appropriate decree. The Board of Aldermen of the City of Frederick promptly adopted the following resolution, approved by the Mayor: "If the City of Frederick offers the City Opera House for rent after the expiration of the current lease on September 30, 1960, it will include a requirement that the lessee operate said City Opera House without discrimination on the basis of race, color or creed. It is understood, however, that this agreement is not a commitment on the part of the City to lease the said City Opera House after September 30, 1960, if the space is required for governmental or other proper municipal purposes." Counsel for plaintiffs proposed a form of decree, going somewhat beyond the resolution, to which counsel for the City was willing to agree with reasonable modifications, but Marva refused to agree to any injunction even if limited to a possible extension of the existing lease or a holding over after the present term.

During the period occupied by these discussions, Marva, through a newly-organized and wholly-owned subsidiary, Frederick Theatres, Inc., purchased the Tivoli Theatre and took over the lease of the other (closed) theatre. Marva has been refurbishing the Tivoli Theatre and intends to operate it and it alone after the beginning of the year 1960, and has sought release from its obligations under the existing lease of the Opera House. The attitude of the theatre company and the resulting delays have caused plaintiffs to withdraw their offer to settle, and they now press for a decree in this action. Counsel for the City says that it will stand by the resolution of October 26, 1959, quoted above, but is considering using the Opera House for additional office space or other municipal purposes. Under these circumstances, plaintiffs are entitled to a decree declaring their rights.

[Tate Case Cited]

In *Department of Conservation & Development v. Tate*, (4 Cir.), 231 F.2d 615, the Court said: "It is perfectly clear under recent decisions that citizens have the right to the use of the public parks of the state without discrimination on the ground of race. *Dawson v. Mayor and City Council of Baltimore*, 4 Cir., 220 F.2d 386, affirmed 350 U.S. 877, 76 S.Ct. 133; *Holmes v. City of Atlanta*, 350 U.S. 879, 76 S.Ct. 141. And we think it equally clear that this right may not be abridged by the leasing of the parks with ownership retained in the state. See *Lawrence v. Hancock, D.C.*, 76 F. Supp. 1004, 1009; *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971, 74 S.Ct. 783, 98 L. Ed. 1112. And it is no ground for abridging the right that the parks cannot be operated profitably on a nonsegregated basis."

In *Derrington v. Plummer*, (5 Cir.), 240 F.2d 922, cert. den. 353 U.S. 924, where discrimination by a lessee operating a cafeteria in a county courthouse was enjoined, the court said: "No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."

It is debatable whether this theatre could be considered surplus property, within the exception stated in *Derrington*. But a place of public assembly, a part of the City Hall, leased under an agreement which contemplated segregation,

comes within the rule announced in *Tate*. Under the facts in this case, including the terms of the lease and of the exhibit attached thereto, the exclusion of Negroes from the main floor of the auditorium and the front of the balcony in the City Opera House and the maintenance of racially segregated toilet facilities therein violate the Fourteenth Amendment.

The action of the City has been so fair, in line with its fine traditions, that the court will not enter an injunction against it.

[Ask Broad Injunction]

Plaintiffs have asked for an injunction so broad that the City would not be able to allow religious, social or fraternal groups to use the Opera House for a single day for their own purposes if they limit admission to members or other ticket holders. Frederick is not a large city, with the many private facilities available in metropolitan areas. Racial equality can be achieved without an injunction which prohibits any private meeting on public property at any time.

I had originally thought that there were equities in favor of allowing Marva to maintain its present arrangements until the end of the term of its lease, September 30, 1960, so that it might not be handicapped in recovering the investment it had made in repairing and improving the Opera House during the present lease. But Marva's recent actions have weakened those equities. I will issue an injunction against Marva Theatres, Inc., its subsidiary, Frederick Theatres, Inc., and their respective officers, agents and employees, enjoining further discrimination by them on the property leased from the City.

HOUSING Brokers—Maryland

Manuel M. BERNSTEIN et al. etc. v. REAL ESTATE COMMISSION OF MARYLAND et al.

Court of Appeals of Maryland, December 18, 1959, 156 A.2d 657.

SUMMARY: Following a decision by a Baltimore municipal court affirming the Maryland Real Estate Commission's conclusion that there was sufficient evidence to justify suspending the licenses of two brokers, the latter appealed to the state court of appeals. The brokers contended, *inter alia*, that the complaints charging them with unethical misconduct consti-

tuted an unlawful conspiracy against the civil rights of themselves and their customers in that they were accused in substance of "block-busting" and that the complaints were intended to prevent Negroes from purchasing and occupying houses of their own selection, in violation of constitutional guarantees. Although the court noted complaint allegations that the brokers had specialized in sales of residential properties to Negroes in formerly all-white neighborhoods, it pointed out that the commission had made it clear that it was not concerned with "block-busting" and had correctly refused to receive evidence as to such even as "explanatory background," and that the municipal court had found nothing to indicate that the commission had been biased or arbitrary in conducting the proceeding. The orders below were affirmed.

HOUSING

Publicly-Assisted Housing—Maryland

Brennie E. HACKLEY, Jr., et ux. v. ART BUILDERS, Inc., Ward & Bosely Co., Inc., Harford County Metropolitan Commission, County Commissioners of Harford County, Maryland, Colonel Roy Muth, et al.

United States District Court, District of Maryland, January 5, 1960, 179 F.Supp. 851.

SUMMARY: A Negro Army reserve officer and his wife attempted to purchase a house in an "all-white" housing development in Harford County, Maryland, near an Army chemical center where he was a civilian employee, but the developers refused to sell for racial reasons. The couple brought a class suit in federal court seeking (1) a declaratory judgment that the developers' action violated plaintiffs' Fifth And Fourteenth Amendment rights; (2) an injunction restraining the developers from refusing to sell houses to Negroes; (3) an injunction restraining a county commission from furnishing water and sewage service to the developers as long as the latter refuse to sell to Negroes, and (4) an injunction restraining the Army center's commanding officer from fulfilling a contract under which the federal government sells water and sewage disposal services to the county commission, "as long as these benefits are used to discriminate against the plaintiffs." Judgment was for defendants. It was held that the developers as private corporations selling to private individuals could legally deal with whom-ever they please; that the public bodies involved neither discriminated in the services they provide nor authorize discrimination; and that the public interest which justifies such public controls as sanitary requirements would not have authorized state control of the management of private housing developments so as to dictate what persons shall be served. The court rejected the argument that, even if there was no governmental control here, the development was given such assistance by the United States and the county commission that the developers' action was governmental action. Rather, it was held that the receipt by private house owners of water and sewage disposal service from public bodies does not make them subject to the same rule as public, or publicly-owned, corporations. Likewise, the contention was overruled that the custom, policy, practice, and/or usage of defendants in concert to discriminate racially against plaintiffs and their class unreasonably interfered with Congress' exercise of powers to raise and support armies and to promote and secure the national defense and the welfare and morals of armed forces members and dependents, in violation of Article I, Section 8, Subsections 12 and 14 of the Constitution. The court found that defendants had not acted in concert and that plaintiff was not classified as military personnel but as a civilian employee.

THOMSEN, Chief Judge.

Plaintiffs are Negroes who attempted to purchase a home in Edgewood Meadows, a private real estate development near the Army Chemical Center at Edgewood, Harford County, Maryland. The developers refused to sell to plaintiffs solely because of their race. Plaintiffs thereupon brought this class action against (a) the developers, (b) the Harford County Metropolitan Commission, which supplies water and sewage disposal service in the Edgewood Sanitary District, and purchases water and sewage disposal service from the United States pursuant to 10 U.S.C.A. 2481, (c) the County Commissioners of Harford County, and (d) Colonel Roy Muth, the Commanding Officer of the Army Chemical Center. Plaintiffs seek: (1) a declaratory judgment that the developers' refusal to sell them a house was a violation of their rights under the Fifth and Fourteenth Amendments, (2) an injunction restraining the developers from refusing to sell houses to Negroes, (3) an injunction restraining the Metropolitan Commission from furnishing water and sewage service to the developers as long as the developers refuse to sell to Negroes, and (4) an injunction restraining Colonel Muth, as Commanding Officer of the Army Chemical Center, from carrying out the contract under which the Government sells water and sewage disposal services to the Metropolitan Commission "as long as these benefits are used to discriminate against the plaintiffs".

Colonel Muth filed a motion to dismiss, but agreed that action on the motion be reserved until after a hearing on the merits. The case has been submitted on an "agreed statement of certain facts", numerous exhibits, and testimony offered by the several parties.

FACTS¹

Plaintiff Brennie E. Hackley, Jr., a Ph.D. in Chemistry and a Captain in the Army Reserve, is employed as a civilian chemist at the Army Chemical Center at Edgewood. Until July 1959 his wife was also employed at the Center. Since 1952 plaintiffs have occupied an apartment in a Wherry housing project, located about a mile and a half from the entrance to the Center and three or four miles from the building where Hackley works. On 30 June 1959 a condemnation proceeding was instituted in this court by the United States to take over the Wherry

housing. See 42 U.S.C.A. 1594. Henceforth those apartments will be assigned to military personnel and civilian employees who are essential to the national defense. Hackley does not fall within either of these classes, so plaintiffs were notified on 1 July 1959 that they would have to move, but have received extensions from Colonel Muth because of the pendency of this suit. The decision to condemn the Wherry housing was made by officials of the United States without consulting any of the defendants. Plaintiffs' race had nothing to do with the decision requiring them to move; there has been no racial discrimination in assigning the apartments.

[Defendants Identified]

Defendant Harford County Metropolitan Commission is a public corporation, organized under Chapter 679 of the Laws of Maryland of 1953, as amended;² its Commissioners are appointed by the County Commissioners of Harford County. The Metropolitan Commission established the Edgewood Sanitary District on 2 July 1957, and has installed a system of pipes, mains and conduits for water distribution and sewage disposal within that district, an area of about four square miles. In June 1958 it issued bonds to finance the construction of the system. Principal and interest charges on the bonds, current operating expenses and maintenance costs are met by benefit assessments on property owners using the system, and by connection charges and service charges. If the monies so generated are not sufficient to pay the principal and interest on outstanding bonds, the County Commissioners shall levy and collect a tax under its general powers of property taxation sufficient to pay said bonds, with interest.

Defendant County Commissioners of Harford County, Maryland, is a municipal corporation.³ It approved the bond issues of the Metropolitan Commission and the public works agreements, hereinafter referred to, but had nothing to do with the other events leading up to this case.

1. See the agreed statement and the exhibits for a fuller statement of some of the facts found.

2. The powers, duties and functions of the Harford County Metropolitan Commission are set out in the following Acts of the General Assembly of Maryland: Chapter 679 of the Acts of 1953, as amended by Chapter 187 of the Acts of 1955, Chapter 746 of the Acts of 1957, and Chapters 281 and 558 of the Acts of 1959.

3. The powers, duties and functions of the County Commissioners of Harford County are set out in the Constitution and Public General Laws of the State of Maryland and in the Code of Public Local Laws of Harford County, 1957 ed., as amended.

Since 1 October 1959 defendant Muth has been Commanding Officer of the Army Chemical Center at Edgewood, where the Government owns, maintains and operates a sewage disposal plant and a water supply plant of sufficient size and capacity to create a surplus of such services beyond the needs of the Government. The applicable statute, 10 U.S.C.A. 2481, authorizes the Secretary of the Army or his designee to "sell or contract to sell to purchasers within or in the immediate vicinity of an activity of the Army . . . any of the following utilities and related services, if it is determined that they are not available from another source and that the sale is in the interest of national defense or in the public interest: . . . (4) Water. (5) Sewage and garbage disposal." The proceeds of such sales "shall be credited to the appropriation currently available for the supply of that utility or service." Army regulations⁴ designate the Chief of Engineers, Headquarters, Department of the Army, acting for the Secretary of the Army, as the Department of the Army Power Procurement Officer, prescribe the policy, responsibility, and procedure for the preparation and approval of contracts for the sale of utility services, and prescribe the form of such contracts.

[Government Supplied Services]

Pursuant to the statute and regulations, the United States, acting through an authorized contracting officer, entered into a contract with the Harford County Metropolitan Commission, dated 14 March 1958, under which the Metropolitan Commission is permitted to procure from the Army Chemical Center water and sewage disposal facilities for most of the Edgewood Sanitary District. The Engineering Corps had charge of the negotiations with the Metropolitan Commission; the Commanding Officer of the Army Chemical Center had no power to fix or alter the terms of the contract, and Colonel Muth, who was appointed Commanding Officer on 1 October 1959, has no such power.

The contract between the United States and the Metropolitan Commission provides that the Government's water and sewage services are temporarily supplied as an accommodation to the Commission because such services are not otherwise readily obtainable by the Commission,

that the furnishing of such services is deemed to be in the public interest, and that the Commission's use of such services is limited to such time as they can be supplied by the Government as surplus to its own needs and the Commission cannot readily obtain such services from another source. The Commission is required at its own expense to install meters and other facilities necessary for making connections with the Government's lines. Through its connecting lines, the Commission is to serve houses, public schools, a post office, the Pennsylvania Railroad, and business establishments in the designated area.⁵ The designated area includes the 103 acres in Edgewood Meadows which are now being developed. The contract, as modified from time to time, fixes the rates per gallon which the Commission pays to the Government for water which it receives from and for sewage which it runs into the Government lines; the contract provides that such charges "shall be the local prevailing rates, if any, for similar services, provided that the rates shall at all times produce a revenue which is not less than the cost to the Government of supplying the services, including losses, overhead and capital charges."

[Users of Services]

Some 165 connections were made by users to the system as originally constructed by the Metropolitan Commission. The present users include 180 private houses, some of which are occupied by Negroes and half of which are occupied by military personnel, a post office, a railroad station, a public school, a private white housing development and a private Negro housing development, both owned by the A & P Realty Co., and lying between the Wherry housing and the entrance to the Chemical Center.

The Metropolitan Commission does not discriminate in any way with respect to the service which it furnishes. It is required by law to furnish its services to all applicants, and no one in the district is now permitted to maintain private sewage disposal facilities.

Defendant Ward & Bosely, Inc., is a Mary-

4. AR 420-41, 30 April 1958; SR 420-470-1, 15 June 1949, including C5, 1 September 1955 and C6, 26 October 1955; AR 420-62, 30 April 1958; and AR 420-62, 6 December 1954.

5. No new Government-owned sewer or water lines were constructed, but the Metropolitan Commission assumed responsibility for maintaining, and replacing if necessary, certain Government-owned lines, as well as for constructing a sewer line approximately one and one-quarter miles in length on Government property. Part of the sewage which is discharged into this outfall sewer line originates in the Wherry housing, now owned by the Government.

land corporation engaged in buying, selling and developing real estate and acting as brokers and agents. Two of its directors own the 103 acres which are presently being developed as part of Edgewood Meadows. An affiliated corporation, defendant Art Builders, Inc., is engaged in the actual construction and development of Edgewood Meadows, and Ward & Bosely, Inc., has the exclusive authority to sell, lease, rent or otherwise dispose of the houses to be erected on the lots in the development. This opinion refers to the two corporations collectively as "the developers".

As now planned, the development will include a recreational area, a shopping center, a professional center and 700 medium-priced houses, 500 of which lie within the boundaries of the Edgewood Sanitary District. Seven houses have been built; one has been sold; the others are being used as sample homes.

[Developers' Contract for Services]

On 25 August 1959 Art Builders, Inc., the Metropolitan Commission and the County Commissioners entered into a preliminary public works agreement, of a type generally used in the counties of Maryland, in connection with the extension of the mains, pipes and conduits of the Metropolitan Commission into Edgewood Meadows. A final agreement, in a customary form, was signed on 6 October 1959. Under those agreements, Art Builders, Inc., undertook, inter alia, to provide water pipes, sanitary sewers, storm drains, streets, and other public facilities in accordance with prescribed standards, to construct a limited number of substantial, detached residential dwelling units on each lot serviced by the water and sewage facilities constructed under the agreement, and to pay for the necessary connections.

The Metropolitan Commission has executed a contract for the construction of necessary pipes, mains and conduits to extend the water and sewage services into Edgewood Meadows, and actual construction has been started by the contractor. The Metropolitan Commission offered \$100,000 of its bonds for sale on 8 December 1959 to finance the construction of this extension, but the sale was cancelled when the complaint in this suit was filed.

No stockholder or director of the developers is a member, officer, or employee of either the County Commissioners of Harford County or the Metropolitan Commission.

During the negotiations between the Metropolitan Commission and the developers there was no discussion as to whether or not the developers would sell houses to Negroes. However, although public facilities in Harford County are desegregated and the schools are being desegregated according to a plan approved by this court and by the Fourth Circuit,⁶ most Negroes live in long-established Negro areas, and private housing developments in the county are all-Negro or all-white.

There is considerable private reluctance to sell homes to Negroes in white areas, but a substantial number of such sales have been made in Aberdeen and Havre de Grace, some in Bel Air, and a few in scattered rural areas.

[Plaintiffs' Attempt to Buy]

In August 1959 Hackley asked one of the County Commissioners privately to inquire whether plaintiffs would be able to buy a home in Edgewood Meadows, and was told that the developers almost certainly would not sell to Negroes. On 9 October 1959, after Hackley learned that the developers were accepting deposits through the mail from prospective buyers, he mailed a letter to Ward & Bosely, Inc., enclosing his check in the amount of \$100 as a deposit on "one of the houses in the development known as Edgewood Meadows". The check was endorsed "for deposit only" by Ward & Bosely, Inc., but was not deposited for collection. Ten days later Hackley visited the corporation's office and inquired of R. Walter Ward whether the deposit would be accepted and plaintiffs would be able to purchase a home in Edgewood Meadows. Ward said that he did not think that houses in Edgewood Meadows would be sold to Negroes, but that he would have to consult with his board of directors before giving a final answer. On or about October 27 Ward & Bosely, Inc., returned the check, and one of its salesman called Hackley on the telephone and told him that his deposit was being returned because Edgewood Meadows would be an "all-white" development.

After 27 October 1959 and prior to the filing of this suit, Ward & Bosely Co., Inc., through one of its salesmen offered plaintiffs a house in Bel Air, ten miles from Edgewood, but the offer was rejected.

6. Moore v. Board of Education of Harford County, D.Md., 152 F. Supp. 114, aff'd, 4 Cir., 252 F.2d 291, cert. den. 357 U.S. 906.

[Development's Convenience to Plaintiffs]

Plaintiffs wish to live in the Edgewood area because of easier access to Hackley's place of work and to the facilities of the Army Chemical Center, such as the officers' club, kindergarten, and the like, and because they have lived in that area since 1950. The Negro housing within ten miles is of poor quality. On the other hand, vacant land in neighboring areas is available to them and plaintiffs are purchasing a piece of land about eight miles away. They have been unable to purchase or rent a satisfactory home in the Edgewood area; but I am not satisfied that they would be unable to purchase a satisfactory home within a reasonable distance of the Center. Colonel Muth considers it desirable that employees of the Center live within ten or twelve miles, but many live in Bel Air and other areas ten to fifty miles away.

In November, just before filing suit, Hackley discussed his housing problems with Colonel Muth, who was sympathetic and called in his legal adviser. If Hackley had wished to "process" a grievance, the contract would have been checked by appropriate authorities, but Hackley decided to take legal action instead.

DISCUSSION

It is elementary that "the action inhibited by the First Section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13; *Williams v. Howard Johnson's Restaurants*, 4 Cir., 268 F.2d 845. The developers of Edgewood Meadows are private corporations, engaged in the business of selling real estate to private individuals. As such, they are legally entitled to deal with whom they please.

The decision not to sell to Negroes was made by the officers of the two private corporations. The other defendants did not participate in the decision in any way. There is nothing in any state or local law, or in any of the contracts offered in evidence, which deals with the question. The public bodies involved in this case—the United States, the County Commissioners and the Metropolitan Commission—do not discriminate in any way in the services which they provide, and they did not authorize any discrimination.

It is true that "Housing is a necessary of life.

All the elements of a public interest justifying some degree of public control are present." *Block v. Hirsh*, 256 U.S. 135, 156, a wartime rent control case. State statutes regulating sanitary requirements have been held valid, but such statutes are designed to protect the health of the community and do not authorize state officials to control the management of private housing developments, apartment houses, and the like, nor to dictate what persons shall be served. *Williams v. Howard Johnson's Restaurant*, supra, at p. 848.

[Public Assistance]

Plaintiffs contend that even if there is no control by any Federal or State agency in this case, there was such assistance to the housing development by the United States and by the Metropolitan Commission that the action of the developers must be characterized as governmental action. However, the Metropolitan Commission rendered no assistance to such developers beyond that generally rendered to developers in Maryland. The Edgewood Sanitary District was established for the benefit of everyone in the district. The Public Works Agreement is an arm's length contract, calling for customary action and payments by the several parties. It did not make the developers agents of the Commission, as contended by plaintiffs. Most apartment house owners and owners of private houses throughout the State receive water and sewage disposal service from public corporations. This does not make such owners subject to the same rules as public corporations, or publicly controlled corporations. See *Williams v. Howard Johnson's Restaurant*, supra; *Eaton v. Board of Managers of James Walker Memorial Hospital*, 4 Cir., 261 F.2d 521; *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541, 14 A.L.R.2d 133, cert. den., 339 U.S. 981, 94 L.Ed. 1385; *Johnson v. Levitt & Sons*, E.D.Pa., 131 F. Supp. 114.

[Stuyvesant Town Case]

In the Stuyvesant Town case there was considerable governmental aid to the private corporation, including tax exemption amounting to many millions of dollars, and aggregation of the land through use of the city's power of eminent domain and through exchange of bordering tracts for city streets which had been closed. Nevertheless, after a full discussion of

Shelley v. Kraemer, supra, *Marsh v. Alabama*, 328 U.S. 501, and other Supreme Court cases, the majority of the Court of Appeals held that the "aid which the State has afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into State action under the constitutional provisions here in question". 299 N.Y. at 536, 14 A.L.R.2d at 146. The facts relied on by the dissenting judges are not present in the instant case. In the *Levittown* case the development of the project had been aided by many FHA and VA guarantees of mortgages, and those agencies had imposed certain requirements with respect to architectural and development plans, the amount and terms of the mortgage loans and continuing obligations to comply with construction requirements in the future. Judge Kirkpatrick held that these requirements did not make *Levitt* a branch of the government nor make the government the developer of the *Levittown* project. He said: "Neither the F.H.A. nor the V.A. has been charged by Congress with the duty of preventing discrimination in the sales of housing project properties. What the plaintiffs are saying in effect is that these agencies ought to be charged with that duty. But that is something which can be done only by Congress and which cannot be forced upon the agencies in question by the courts through the medium of the injunctive process." 131 F. Supp. at 116.

The contract between the United States and the Metropolitan Commission is not essentially different from the arrangement between Baltimore City and Baltimore County.⁷ The fact that the Federal Government is involved and not another State agency is immaterial. *Johnson v. Levitt & Sons*, supra. The thrust of the Fifth Amendment is no stronger than the thrust of the Fourteenth, and is similarly limited to public action.

The only case to the contrary, *Ming v. Hogan*, Sup. Ct. Sacramento, Cal., 3 Race Rel. L. Rep. 693, is not legally persuasive. If the rule contended for by plaintiffs were adopted, where should the line be drawn? Every business, every property owner receives various services from the State and Federal Governments, many of them at less than cost.

7. Authorized by Chapter 539, Laws of Maryland, 1924; Code of Public Local Laws of Baltimore County, 1955 ed., sec. 498 et seq.

[Inapplicable Cases]

Plaintiffs contend that the developers are lessees of the Metropolitan Commission and sublessees of the United States, and that this case is controlled by *Department of Conservation and Development v. Tate*, 4 Cir., 231 F.2d 615. See also *Derrington v. Plummer*, 5 Cir., 240 F.2d 922, cert. den. 353 U.S. 924. Those cases do not apply here. In the first place, the developers are not lessees of the Metropolitan Commission, and the contract between the Metropolitan Commission and the United States is not a lease. Even if it were, the essential facts which dictated the decisions in *Tate* and *Derrington* are not present here. Moreover, the services sold by the United States to the Metropolitan Commission were surplus services, above the needs of the Government. Cf. *Derrington v. Plummer*, supra, at p. 925. The other decisions cited by plaintiffs dealt with entirely different situations.

Plaintiffs' final point is "that the custom, policy, practice and/or usage of the defendants in concert and by design in excluding the plaintiffs and other persons, similarly situated, who are members of the Reserve Armed Forces of the United States and who are employees of a priority National Defense installation of the United States situated and located in Harford County, Maryland, from housing zoned, regulated and controlled by a Governmental subdivision of the State of Maryland and to be serviced, exclusively, as to water and sewage, solely because of the plaintiffs' race and color, is unconstitutional and void in that said custom, policy, practice or usage constitutes an unreasonable interference with the burden upon the exercise by the Congress of the United States of its powers to raise and support armies, to promote and secure the National Defense of the United States and to promote and secure the welfare and morals (sic) of the members of the Armed forces of the United States and their dependents, as provided by Article 1, Section 8, Subsection (12) and (14) of the Constitution of the United States".

[No Concert Among Defendants]

There was no concert or design between Colonel Muth, the United States, the County Commissioners of the Metropolitan Commission, and the developers. Hackley is an officer in the Army Reserve, but he is a civilian employee of

the Army Chemical Center. If he were classed as military personnel or if he were essential to the national defense, he could remain in his present apartment.

The plight of the Hackleys has aroused more sympathy in the court than counsel for defendants feel is justified, but I cannot find, as urged by plaintiffs in their brief, that the refusal of the developers to sell them a home in Edgewood Meadows "while under a vacating order from the Army Chemical Center in effect will remove the plaintiff Brennie E. Hackley, Jr., from his employment and cause him to resign from the Army". Even if it would cause him to resign, that would not justify, under Art. 1, sec. 8 (12) and (14) of the Constitution, the proposed injunction against Colonel Muth, requiring him to interrupt the furnishing of water

and sewage service to the Metropolitan Commission under the contract. Moreover, such an injunction would leave without any water or means of sewage disposal the families of military personnel and civilian employees of the Army Chemical Center, Negro as well as white, to say nothing of other innocent civilians.

Plaintiffs have proved no case entitling them to any of the relief prayed. This decision makes it unnecessary to determine whether, if plaintiffs had proved a case, the complaint should nevertheless be dismissed as against Colonel Muth as an unconsented suit against the United States. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682.

Judgment will be entered in favor of defendants, with costs.

HOUSING

Publicly-Assisted Housing—New Jersey

LEVITT AND SONS, INCORPORATED, a New York Corporation v. **DIVISION AGAINST DISCRIMINATION IN STATE DEPARTMENT OF EDUCATION**, Willie R. James and Franklin D. Todd.

GREEN FIELDS FARM, INC., a New Jersey Corporation v. **DIVISION AGAINST DISCRIMINATION IN STATE DEPARTMENT OF EDUCATION** and Yuther Gardner.

Supreme Court of New Jersey, February 9, 1960, 158 A.2d 177.

SUMMARY: When certain Negroes filed complaints with the New Jersey Department of Education, Division Against Discrimination, charging that corporate real estate developers had refused to sell houses to them because of their race contrary to the state Law Against Discrimination, the developers instituted actions in a state superior court challenging the asserted jurisdiction of the Division. The actions were dismissed and the developers appealed to the court's appellate division which held that the housing in question constituted "publicly assisted housing accommodations" within the meaning of the Law Against Discrimination [2 Race Rel. L. Rep. 1032 (1957)], in view of the large scale operation of FHA in connection therewith. The cases against the corporate developers were remanded to the Division, the complaints therein stating a cause of action within its enforcement jurisdiction; but complaints against the individual officers of the corporation were held to be barred because not filed within 90 days. 56 N. J. Super. 542, 153 A.2d 700, 4 Race Rel. L. Rep. 658 (1959). The corporate developers made further appeal. Since the questions raised thereby were purely legal, the state supreme court held it unnecessary for appellants first to exhaust administrative remedies. On the merits, the judgments were affirmed. The argument that the housing was not "publicly assisted" at the time offered for sale or when discrimination occurred because financing to that point had been entirely private was rejected, the court stating that it was "inconceivable" that the developments ever would have been built without FHA commitments and the prospects of a mass market opened by FHA and other government insured loans. And, although the statute in enumerating examples of publicly assisted housing did not

specify the instant type situation, the court, applying a liberal interpretation to legislative implementation of the state constitution's clear policy against discrimination, held that indirect as well as direct assistance to housing construction was comprehended in the legislature's purpose. It was further held that the legislature had not intended to limit the scope of the anti-discrimination statute to prior existing situations; that the legislature had not, by making the statute applicable only to publicly assisted housing, created a palpably unreasonable classification in violation of the Fourteenth Amendment, particularly when appellants had shown no actual injury; that rights conferred by federal law had not been discriminated against, inasmuch as all kinds of publicly-assisted housing were embraced by the statute; that Congress' refusal to incorporate a policy of non-discrimination in national housing legislation did not indicate federal pre-emption rendering nugatory state action forbidding racial discrimination in federally assisted housing; and that there was no conflict here between national and state laws which would nullify the latter under the federal Constitution's supremacy clause.

BURLING, J.

The plaintiff Levitt and Sons, Incorporated, a New York corporation authorized to do business in New Jersey, (hereinafter referred to as Levitt) is the developer of a single home housing project called Levittown, located in Levittown Township, Burlington County, New Jersey. The plaintiff Green Fields, Inc., a New Jersey Corporation, (hereinafter referred to as Green Fields) is the developer of a similar project called Green Fields Village, located in West Deptford Township, Gloucester County, New Jersey. Defendants Todd and James allegedly were rejected by Levitt as purchasers of houses in Levittown because of their color; both are Negroes. Defendant Gardner, also a Negro, allegedly was rejected by Green Fields as a purchaser of a house in Green Field Village because of his color. All three, Todd, James and Gardner, filed individual complaints with the New Jersey Division Against Discrimination (hereinafter referred to as DAD) charging the plaintiffs with refusals to sell to the individual defendants in violation of the New Jersey Law Against Discrimination, N.J.S.A. 18:25-1 et seq., and seeking an order of the DAD requiring the plaintiffs to cease and desist their discrimination against the complainants. Findings of probable cause for the complaints were made by the DAD pursuant to N.J.S.A. 18:25-14, and attempts at conciliation pursuant to the same statute were unsuccessful. Each of the individual defendants then filed amended complaints, Todd and James naming William J. Levitt, an officer of Levitt, as an additional respondent to their complaints, and Gardner naming Robert A. Budd and Horace B. Peters, officers of Green Fields, as additional respondents to his complaint. The complaints were set down for hearings (Gardner's complaint was to be heard separately from

Todd's and James') but postponed to a later date.

[DAD's Jurisdiction Challenged]

Before they could be held, however, Levitt and Green Fields instituted independent suits in lieu of prerogative writs in the Superior Court, Law Division, challenging the jurisdiction of the DAD to hear the discrimination complaints and attacking the constitutionality of the New Jersey Law Against Discrimination. The suits were consolidated for hearing and on defendants' motion were dismissed by the trial court on the grounds that an appeal from any action of the DAD must be taken to the Superior Court, Appellate Division, as provided in R.R. 4:88-8(b) and that in any event plaintiffs had failed to exhaust their administrative remedies, R.R. 4:88-14. Plaintiffs appealed to the Superior Court, Appellate Division. That court agreed to hear the matter as if leave had been requested and granted to appeal from the DAD's setting down of the discrimination complaints for hearing and then decided the cause on its merits. 56 N.J.Super. 542, 153 A.2d 700 (App.Div.1959). It held the Law Against Discrimination, N.J.S.A. 18:25-1 et seq., to be constitutional and affirmed the jurisdiction of the DAD to consider the discrimination complaints. It dismissed, however, those complaints insofar as they related to the individual respondents, William J. Levitt, Robert A. Budd and Horace B. Peters, holding that as to these persons the discrimination complaints were not filed within the time required by the statute, from which determination no appeal has been taken. Levitt and Green Fields appealed to this court from that part of the Superior Court, Appellate Division's decision applicable to them. The appeal is made to this court as a matter of right because of the substantial constitutional questions involved.

R.R. 1:2-1(a). Since the filing of the actions in lieu of prerogative writs, the hearings in the DAD on the discrimination complaints have been stayed by successive orders, first by the trial court, then by the Superior Court, Appellate Division. Before the arguments in this court, however, we granted the DAD's motion to permit the hearings in the DAD to continue.

[The Levittown Project]

Levitt's single home housing project, Levittown, in which approximately 2,000 houses have been built to the present time, will contain 16,000 houses when completed, according to original plans. Green Fields' project, Green Fields Village, comprises approximately 550 houses, all of which have been sold. Originally 700 units were to have been constructed in Green Fields Village, but all houses constructed to date have been sold, and apparently no new construction has begun. Both projects have been planned and constructed in order that they might qualify for purchase money loans insured by the Federal Housing Administration (FHA), a process which requires attention to the desired end from the very earliest beginnings of the development.

Before construction has begun, a housing project developer who seeks to have FHA insured loans available to purchasers of his houses must contact an FHA office in the region in which the project will be located to obtain FHA approval of the site selected for the project. Once a site approval is given, the developer will submit detailed subdivision information to the FHA office, on a form prepared by the FHA, together with certain exhibits, such as a topographic map, photographs, detailed development plan and like items; frequently these are amended or completely revised to accord with suggestions made by the FHA. When the subdivision information and exhibits are satisfactory to the FHA, that agency issues a subdivision report, giving FHA requirements concerning street layouts, curb and sidewalk specifications, utilities, drainage, open spaces, lot improvements and similar matters. House plans are submitted to determine if they meet FHA requirements; the FHA architectural section will often recommend changes in these plans. Upon receiving the subdivision report, the developer arranges with an FHA-approved lending institution to submit individual applications for commitments for FHA insurance on any loan which might be made by the institutions. These individual applications are reviewed by the archi-

tectural, valuation and mortgage credit sections in addition to the Chief Underwriter's office, after which commitments are issued to the approved lending institution covering the individual properties contemplated in the application. These commitments take various forms. One is a conditional commitment, an agreement between the FHA and the approved lending institution that, subject to the conditions stated in the commitment and subject to the approved lending institution's submitting a proposed purchaser whose qualifications are satisfactory to the FHA, a loan made to finance the purchase of the property in question will be insured. Another form of commitment is an "Operative-Builder Firm Commitment," which differs from a conditional commitment primarily in that the former also contemplates loans being made directly to the developer, prior to sale, if requested.

[Effect of FHA Commitments]

Once the commitment is issued, the developer may commence construction. As construction progresses, the developer or the approved lending institution through which the FHA commitment was made arranges for an FHA inspection. Normally three such inspections are made during the course of construction. In some larger developments, such as Levittown, an FHA inspector is stationed at the project. Often the inspector, or other FHA personnel will meet with the developer to discuss problems that have arisen during construction affecting compliance with FHA requirements. As the houses are sold by the developer to purchasers interested in obtaining an FHA insured mortgage loan, an application for approval of the purchaser is submitted to the FHA by the approved lending institution to whom the conditional commitment was made. If the qualifications of the purchaser are satisfactory to the FHA, an individual firm commitment is issued to the approved lending institution in the name of the purchaser. After title is closed, the approved lending institution submits the mortgage bond to the FHA along with copies of the bond, the mortgage and the original commitment. When these are approved, the FHA endorses the bond for insurance, which comprises the contract between the FHA and the lender.

[FHA Financing Availability Advertised]

Having received conditional commitments, the developer advertises the availability of FHA

financing to purchasers. By using FHA insured loans, a purchaser needs only a 3% downpayment on a principal sum of up to \$13,500, 15% on the difference between \$13,500 and \$16,000, and 30% on the difference between \$16,000 and \$20,000. The term of the loan may be as long as 30 years. Conventional financing often involves downpayments of 20% to 25% and frequently will be limited to terms of 20 to 25 years. Thus it is apparent that FHA financing is a large factor in stimulating home buying, since the low downpayment opens the home market to persons who have accumulated only small savings and the extended term of the loan allows home ownership to be achieved by payments from income by a much larger proportion than would ordinarily be the case. Concerning the importance of FHA approval to the large housing project developer, Robert A. Budd, president of Green Fields, stated on his deposition that such approval "is the basics (sic) on which to go on." William Levitt, president of Levitt, stated before the House Subcommittee on Housing of the Committee on Banking and Currency of the Eighty-Fifth Congress that "We are 100 percent dependent on Government. Whether this is right or wrong it is a fact." Only a very small percentage of the buyers of homes in Levittown and Green Fields Village financed their purchase other than with federally insured loans.

I

Since the questions involved in this appeal relate to the jurisdiction of the administrative agency and the constitutionality of the statute on which the administrative action in question is based, it is apparent that plaintiffs should not be made to exhaust their administrative remedies before pursuing the present action. *Fischer v. Bedminster Tp.*, 5 N.J. 534, 542, 76 A.2d 673 (1950); *Ward v. Keenan*, 3 N.J. 298, 302-309, 70 A.2d 77 (1949). The questions are purely legal, an area where the administrative expertise would be of no real value. Under such circumstances, we have consistently held that exhaustion of remedies will not be required. *Honigfeld v. Byrnes*, 14 N.J. 600, 604, 103 A.2d 598 (1954); *Nolan v. Fitzpatrick*, 9 N.J. 477, 487, 89 A.2d 13 (1952). And the applicable rule, R.R. 4:88-14, has been so interpreted. *Honigfeld v. Byrnes*, supra. We may proceed, therefore, to the merits of the appeal.

II

First to be determined is whether the DAD has jurisdiction under the Law Against Discrimina-

tion, N.J.S.A. 18:25-1 et seq., to entertain the complaints brought by the individual defendants against the plaintiffs. There are two questions here. The first is whether the plaintiffs' developments are "publicly assisted housing accommodation" as that phrase is used in section 4 of the Law Against Discrimination and amplified by section 5(k) of that statute. The second is, if plaintiffs' developments are within the classification, whether the statute gives the DAD jurisdiction to hear or act on complaints claiming discrimination with respect thereto.

A

Does "publicly assisted housing accommodation" as used in section 4 of the Law Against Discrimination, N.J.S.A. 18:25-4, apply to plaintiffs' projects? Plaintiffs point to N.J.S.A. 18:25-5(k), which states:

"k. 'A publicly assisted housing accommodation' shall include all housing built with public funds or public assistance pursuant to chapter 300 of the laws of 1949, chapter 213 of the laws of 1941, chapter 169 of the laws of 1944, chapter 303 of the laws of 1949, chapter 19 of the laws of 1938, chapter 20 of the laws of 1938, chapter 52 of the laws of 1946, and chapter 184 of the laws of 1949, and all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof."

In approaching the construction of the statute it is necessary to be mindful of the clear and positive policy of our State against discrimination as embodied in N.J. Const., Art. I, par. 5. Effectuation of that mandate calls for liberal interpretation of any legislative enactment designed to implement it.

[Statute's Applicability to Plaintiffs]

Plaintiffs argue that, since any other portion of this statute is not applicable, their projects are publicly assisted housing accommodations only if they are "housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof." And even this portion of section 5(k) is not applicable, plaintiffs contend, inasmuch as their projects were financed on an entirely private

basis until title passed from the developer to the purchaser, at which point there could be no discrimination by the developer since the house was no longer within his control. Stated with greater particularity, the argument is that the Law Against Discrimination, insofar as it relates to housing, imposes the principle of non-discrimination in selecting a purchaser only on the condition that the housing is "financed . . . by [federally insured] loan . . ." (Emphasis supplied.) If the housing is not so financed, the owner may act discriminately in selecting a purchaser. This implies, plaintiffs contend, that the federally insured loan must be in existence with respect to the housing at the time the discrimination occurs if it is to be said that the discrimination violates N.J.S.A. 18:25-1 et seq. If there exists at the time of discrimination only an FHA commitment to insure a loan made with respect to the house, plaintiffs argue that this is not enough. The statute, they urge, applies only if there exists at the time of discrimination a federally insured loan made with respect to the housing in question. Thus, pointing to their own situation plaintiffs conclude that since the discrimination could occur only as to the houses still owned by plaintiffs, and since at the time none of these houses were financed by a federally insured loan, the discrimination charged against plaintiffs could not have violated the Law Against Discrimination, N.J.S.A. 18:25-1 et seq. While plaintiffs admit that the houses they built most likely, when sold, *would be* financed by a federally insured loan, and the FHA commitments were obtained in *contemplation* of such financing, they argue that the statute does not speak in terms of future possibilities, but only of existing conditions. To support this conclusion, plaintiffs contend that if the Legislature had intended the Law Against Discrimination to apply to housing as to which FHA commitments to insure had been issued, it could easily have done so. They point to the New York Law Against Discrimination, which served as a pattern for the New Jersey statute. It has a provision absent in the New Jersey statute relating to housing as to which FHA commitments have been issued, N.Y. Executive Law, McKinney's Consol. Laws, c. 18, § 292, subd. 11(e), the implication being that by omitting this provision, our Legislature intended to remove such housing from the coverage of this State's act. Furthermore, plaintiffs would draw the same conclusion from the Legislature's failure subsequently to adopt bills which

would have expressly included the FHA commitment situation within the New Jersey Law Against Discrimination.

[Point Unnecessary to Decide]

Under the view we take of the statute in question, however, it is unnecessary to decide whether section 5(k) of the statute as it now reads applies to houses as to which FHA commitments to insure loans have been issued. It may be noted, however, that there is much persuasive force in the argument that in the context of this type of case a liberal interpretation of the word "financed" is justified and required, and under such interpretation plaintiffs' housing should be considered "financed" by a loan secured by a mortgage, the repayment of which is insured by the federal government. But even admitting for the sake of argument the validity of plaintiffs' contention described above, we believe that N.J.S.A. 18:25-4 applies to the developments in question.

Section 4 of the Law Against Discrimination, N.J.S.A. 18:25-4, states:

"All persons shall have the opportunity to obtain employment, to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation and publicly assisted housing accommodation, without discrimination because of race, creed, color, national origin or ancestry, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

[A Limited Meaning Urged]

The plaintiffs would confine the meaning of "publicly assisted housing accommodation" to those examples enumerated in N.J.S.A. 18:25-5(k). We disagree. Rather, we believe the type of housing listed in section 5(k) to be only illustrations of the meaning of the phrase being considered, rather than an exhaustive enumeration. The reason for this conclusion lies in the Legislature's use of the words "shall include." In *State v. Rosecliff Realty Co.*, 1 N.J. Super. 94, 62 A.2d 488 (App. Div. 1948) certification denied 1 N.J. 602 (1949), the court was considering an alleged violation of the civil rights statute, R.S. 10:1-1 et seq., N.J.S.A. Involved was whether a swimming pool was a "place of public accommodation, resort, or amusement" as that phrase

is used in the civil rights statute. The latter phrase was defined in R.S. 10:1-5, N.J.S.A. which stated that the term "shall be deemed to include" many specific places, none of which was a swimming pool. The court stated:

"The court below was of the opinion 'that the legislature went to great length in setting forth and defining "place of public accommodation, resort or amusement."' This view is incorrect. The language of section 5 is 'a place of public accommodations, resort or amusement within the meaning of this chapter shall be deemed to include' certain enumerated places. If it was the intent to narrow the broad scope of the phrase 'any places of public accommodation, resort or amusement,' as used in Section 2, inept language was used for that purpose. The verb 'include' has not been defined so as to give to it such a restrictive meaning." *State v. Rosecliff Realty Co.*, supra, 1 N.J.Super. at page 101, 62 A.2d at page 491.

In *American Surety Co. of New York v. Marotta*, 287 U.S. 513, 517, 53 S.Ct. 260, 77 L.Ed. 466 (1933), the Supreme Court held that the term "creditors," as used in the Federal Bankruptcy Act, 11 U.S.C.A. § 1 et seq., has a broader meaning than the specific examples of the term given in the definitions section of that statute, which examples were headed by a phrase indicating that, for the purposes of the Bankruptcy Act, the word "creditor" shall include certain persons. To the same effect concerning the meaning of "include," see *Central R. Co. of New Jersey v. Director, Division of Tax Appeals*, 8 N.J. 15, 28, 83 A.2d 527 (1951); *United States v. Gertz*, 249 F.2d 662 (9 Cir. 1957); *People v. Western Air Lines*, 42 Cal.2d 621, 268 P.2d 723 (Sup.Ct.1954); *Red Hook Cold Storage Co. v. Department of Labor*, 295 N.Y. 1, 64 N.E.2d 265, 163 A.L.R. 439 (Ct.App.1945).

[Legislative Intent]

Two further observations are pertinent. First, the Legislature, by certain portions of the definitions section of the Law Against Discrimination, N.J.S.A. 18:25-5, evinced its ability to give a term an exclusive definition by stating that the term shall "mean" certain things. N.J.S.A. 18:25-5(g), (h), and (j). Second, the Legislature's failure to state expressly that housing covered by FHA commitments was within the Law Against Dis-

crimination, either by copying that portion of the New York statute relating to such commitments or by adopting amendments to the Law Against Discrimination intended to achieve the same result, can be attributed to the general phrase "publicly assisted housing accommodation" being considered as sufficient by itself to include such housing within the purview of the statute. Cf. *Key Agency v. Continental Cas. Co.*, 31 N.J. 98, 105, 155 A.2d 547 (1959).

Thus we hold that "publicly assisted housing accommodation," as used in N.J.S.A. 18:25-4, is not limited in meaning to the instances set out in N.J.S.A. 18:25-5(k), although those examples are illustrations of the general situations in which N.J.S.A. 18:25-4, insofar as it pertains to housing is applicable. And it is not difficult to perceive that the developments in question fall into the class of housing described by the portion of N.J.S.A. 18:25-4 under consideration.

[Projects Included by Statute]

The statute plainly includes, as publicly assisted housing, housing projects such as those here involved as to which, at the time of the discrimination, an FHA insured loan is committed. N.J.S.A. 18:25-5(k). And the public assistance demonstrated by the federal insurance of such loans is much the same, under the circumstances of this case, as that demonstrated by an FHA commitment to insure housing loans. Just as ownership of housing and its concomitant benefits attributable to an FHA insured loan is said by the statute to be publicly assisted, by the same reasoning the advantages which accrue to the developers in question from the FHA commitments are plainly the result of public assistance. The very existence of the development can be attributed to the FHA commitment. The mass market opened by FHA and other government insured purchase money housing loans accounts for the prospect of sufficient buyers to purchase the housing in question. Without such a mass market, it is inconceivable that the developments would have been built; the number of prospective purchasers with adequate savings accumulated to make the downpayment required by conventional financing and with sufficient income to meet from their income the payments on a conventionally financed debt would not warrant the mass housing construction in evidence today. Thus the very fact that there are houses with which to discriminate in the development in question is primarily attributable to

public assistance. We need not here decide what are the outer limits of the term "publicly assisted housing accommodation." Suffice it to say that the public assistance rendered the housing here in question places it within the definition of that term as used in N.J.S.A. 18:25-4, and perhaps within N.J.S.A. 18:25-5(k).

B

The plaintiffs next argue that, even should their developments be construed to be publicly assisted housing, the DAD is without jurisdiction to hear the charges brought by the individual defendants inasmuch as the Legislature, while it established as a civil right access to publicly assisted housing, failed to give the DAD power over discrimination in any type of housing save that described in the first portion of N.J.S.A. 18:25-5(k). This argument runs as follows: The first New Jersey statutes forbidding discrimination in respect to housing were passed in 1950. L. 1950, c. 105 to c. 112 N.J.S.A. 55:14A-7.5, 39.1, 55:14B-5.1, 55:14C-7.1, 55:14D-6.1, 55:14E-7.1, 55:14H-9.1, 55:16-8.1. These related to housing built pursuant to L.1949, c. 300, N.J.S.A. 55:14A-31 et seq.; L.1941, c. 213, N.J.S.A. 55:14C-1 et seq.; L.1944, c. 169, N.J.S.A. 55:14D-1 et seq.; L.1949, c. 303, N.J.S.A. 55:14H-1 et seq.; L.1938, c. 19, N.J.S.A. 55:14A-1 et seq.; L.1938, c. 20, N.J.S.A. 55:14B-1 et seq.; L.1946, c. 52, N.J.S.A. 55:14E-1 et seq.; and L.1949, c. 184, N.J.S.A. 55:16-1 et seq. There existed uncertainty as to the mode of enforcement of the statutes passed in 1950, and as a consequence N.J.S.A. 18:25-9.1 was enacted. See the preamble to L.1954, c. 198, and the Statement of Purpose accompanying Senate Bill 78, (1954). When L.1957, c. 66 was adopted, amending N.J.S.A. 18:25-4 to pertain to publicly assisted housing accommodations and adopting N.J.S.A. 18:25-5(k), N.J.S.A. 18:25-9.1 was left unchanged. Thus plaintiffs argue that the DAD has jurisdiction to act only on charges of discrimination in connection with housing referred to in the acts to which L.1950, c. 105 to c. 112 were amendments. We think, however, that to adopt this argument would be to construe the statute in question too strictly. N.J.S.A. 18:25-9.1 states:

"The Division Against Discrimination in the State Department of Education shall enforce the laws of this State against discrimination in housing built with public funds or public assistance, pursuant to any law, be-

cause of race, religious principles, color, national origin or ancestry. The said laws shall be so enforced in the manner prescribed in the act to which this act is a supplement." L.1954, c. 198, § 1. (Emphasis supplied.)

The phrase "pursuant to any law" suggests that the Legislature had no intention of limiting the scope of the statute to any prior existing situations; rather, it intended that the procedures set out in the Law Against Discrimination be available to remedy any charge of unlawful discrimination in respect to housing. Even if the verb "built" be narrowly construed so that only houses constructed with public assistance, rather than houses constructed or owned by means of public assistance, N.J.S.A. 18:25-9.1 still applies to the developments in question. As we pointed out above, the housing with which we are concerned owes its existence to federally insured purchase money loans which create a mass market for consumption of the product produced by plaintiffs. There is no express provision in the statute providing that the public assistance be given directly to achieve the construction of the housing. And to construe public assistance as referring to indirect as well as direct help would seem to conform to the ends sought to be achieved by the Legislature by enacting the Law Against Discrimination. We hold, therefore, that N.J.S.A. 18:25-1 et seq. applies to the plaintiffs' developments in question.

III

The plaintiffs do not argue, and hence, we do not decide, whether by restricting their ability to dispose of their property as they choose the statute in question violates due process. See *O'Meara v. Washington State Bd. Against Discrimination*, No. 535996 (Super.Ct. King Cty., Washington State 1959) (not officially reported); *Avin, Trade Regulations, Survey of the Law of New Jersey, 1956-1957*, 12 Rutgers L.Rev. 149, 150-160 (1957). But see *New York State Commission Against Discrimination v. Pelham Hall Apartments*, 10 Misc.2d 334, 170 N.Y.S.2d 750 (Sup.Ct.1958); Note, 107 U.Pa.L.Rev. 515, 525-530 (1959); Note, 12 Rutgers L. Rev. 557, 558-567 (1958). There is ample support for a conclusion that lack of adequate housing for minority groups, an effect of discrimination in housing, causes crime- and disease-breeding slums. See *Berman v. Parker*, 348 U.S. 26, 33-34, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Crommett v. City of Portland*, 150 Me. 217, 107 A.2d 841, 850 (Sup.Jud.

Ct.1953); *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153, 154, 105 A.L.R. 905 (Ct.App.1936); *City of Newark v. Charles Realty Co.*, 9 N.J.Super. 442, 453-456, 74 A.2d 630 (Ct.Ct.1950). Freedom with regard to property is not inviolable; it is subject to the reasonable exercise of the Legislature's police power. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865 (1921). The presumption is in favor of constitutionality, *Gibraltar Factors Corp. v. Slapo*, 23 N.J. 459, 463, 129 A.2d 567 (1957), and the burden of proof and persuasion is heavy on the party contesting the statute. In the absence of a showing of clear abuse of the police power, the tendency is to leave the wisdom of the statute as a political rather than judicial question. We may pass this question without decision, however, and proceed to consider matters briefed and argued by the parties.

IV

The plaintiffs argue that the Law Against Discrimination, by including within its purview only publicly assisted housing, creates an unreasonable and arbitrary classification in violation of the Fourteenth Amendment to the United States Constitution and the New Jersey Constitution 1947, Article I, Section 1. They argue that the relationship between the end towards which the statute is directed and the class to which it is applicable is not based on reasonable grounds. In other words, since the statute was intended to eliminate discrimination in housing, it must apply to housing generally, and since there is no difference between publicly assisted housing and housing generally insofar as the ability to discriminate or its effects are concerned, the distinction, and hence the statute, must fall.

As we indicated above, the presumption favors the constitutionality of the statute and it will be upheld unless facts judicially known or proved refute that presumption. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 594, 59 S.Ct. 744, 83 L.Ed. 1001 (1939); *Gibraltar Factors Corp. v. Slapo*, 23 N.J. 459, 463, 129 A.2d 567 (1957). The strong burden on the party attacking the constitutionality of a legislative classification (*New Jersey Restaurant Ass'n, Inc. v. Holderman*, 24 N.J. 295, 300, 131 A.2d 773 (1957)) has been expressed in various formulae. Thus, the classification will be sustained unless it causes invidious discrimination. *Morey v. Doud*, 354 U.S. 457,

463, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957); *Schmidt v. Board of Adjustment*, 9 N.J. 405, 418, 88 A.2d 607 (1952). The Legislature must only avoid arbitrary discrimination between persons similarly circumstanced. *Gundaker Central Motors, Inc. v. Gassert*, 23 N.J. 71, 80, 127 A.2d 566 (1957), appeal dismissed 354 U.S. 933, 77 S.Ct. 1397, 1 L.Ed.2d 1533 (1958). But it is not sufficient to show that there are others equally guilty of the evil to be remedied to which the statute could have been made to apply. As was stated in *New Jersey Restaurant Ass'n, Inc. v. Holderman*, 24 N.J. 295, 300, 131 A.2d 773, 776 (1957):

"* * * It is easily stated that the classification (1) must not be palpably arbitrary or capricious, and (2) must have a rational basis in relation to the specific objective of the legislation. But the second proposition is qualified by limitations which compound the difficulties of one who assails the legislative decision. Thus it is not enough to demonstrate that the legislative objective might be more fully achieved by another, more expansive classification, for the Legislature may recognize degrees of harm and hit the evil where it is most felt. [Citing cases.] The Legislature may thus limit its action upon a decision to proceed cautiously, step by step, or because of practical exigencies, including administrative convenience and expense, * * * or because of 'some substantial consideration of public policy or convenience or the service of the general welfare.' * * * Hence it may 'stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact.'"

[Reasonable Classification]

Considering the circumstances which led to the enactment of the statute in question, it becomes apparent that the classification presents no constitutional difficulties. We may note the pressing need for adequate housing for minority groups. Many more in these groups than at present would be in a position to take an active and beneficial role in the cultural, social and economic life of the community were they given an opportunity, and a vital factor in affording this opportunity is access to normal housing accommodations. The portion of the statute in question which relates to housing may be viewed as a

means chosen to ease the housing problem facing minority groups. It may be argued that the main purpose is to secure some measure of adequate housing for minorities and only incidentally to this purpose is discrimination proscribed. The desired end may be achieved by legislating in regard only to a specific kind of housing. And the type of housing chosen is that most easily financed and as to which established patterns would least likely be disturbed. If these goals are not the intent of the Legislature, they do at least serve to demonstrate, insofar as they give a reasonable basis for the statutory classification, that the statute is not invalid on its face or palpably arbitrary. Cf. *Sage Stores Co. v. State of Kansas*, 323 U.S. 32, 35, 65 S.Ct. 9, 89 L.Ed. 25 (1944); *Jamouneau v. Harner*, 16 N.J. 500, 519-520, 109 A.2d 640 (1954), certiorari denied 349 U.S. 904, 75 S.Ct. 580, 99 L.Ed. 1241 (1955); *Reingold v. Harper*, 6 N.J. 182, 194, 78 A.2d 54 (1951). In the absence of a showing of an actual injury to the plaintiffs, which was not attempted in the proofs, we cannot declare the legislation unconstitutional. Thus, the means chosen by the Legislature to accomplish its goals are not unreasonable, and on that basis we hold that plaintiffs' argument that the Law Against Discrimination incorporates an unconstitutional classification is without merit.

V

In their brief, plaintiffs make the argument that:

"The Law Against Discrimination, by singling out federally assisted housing for special regulation without providing for correlative regulations of all state assisted housing unconstitutionally discriminates against rights conferred by federal law."

The premise is that N.J.S.A. 18:25-5(k) is a definitive enumeration for purposes of the statute of all kinds of "publicly assisted housing accommodation" as used in N.J.S.A. 18:25-4. As we held above, this notion is incorrect. And the whole argument must fall with the premise on which it is based.

VI

The plaintiffs next argue that the Law Against Discrimination invades a legislative field preempted by Congress and is for this reason invalid, citing *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed.

640, rehearing denied 351 U.S. 934, 76 S.Ct. 785, 100 L.Ed. 1462 (1956), and *Hill v. State of Florida*, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782, rehearing denied 326 U.S. 804, 66 S.Ct. 11, 90 L.Ed. 489 (1945). Plaintiffs state that "Congress, as an integral part of its legislative program, determined not to prohibit discrimination in the sale or lease of FHA insured housing," and the reason from this is that any state law having that effect would violate congressional policy and the rule of preemption.

There is a considerable gap between Congress' refusing to adopt an express policy of non-discrimination in regard to FHA insured housing, to be applicable under all circumstances and in all sections of the country, and a congressional policy prohibiting states from enacting laws proscribing such discrimination. Congress did refuse to accept amendments to various versions of the National Housing Act, 12 U.S.C.A. § 1701 et seq., which would have expressly prohibited the discrimination with which plaintiffs are charged. Comment, 59 Colum.L.Rev. 782, 784, n. 17 and text accompanying (1959). But to construe this action as establishing a congressional policy against state laws having the same effect is not warranted by the circumstances. Failure of Congress to incorporate in the National Housing Act a positive imposition of a policy of non-discrimination with its necessary national implications may be grounded in political expediency to secure its enactment and, in any event, such a provision would not account for local conditions and the effect of such a policy, on a local basis, on the national housing program. But state laws incorporating such a policy, taking into account and being expressly designed to meet purely local conditions and attitudes, are not subject to the same difficulty. Thus there appears reason why Congress might have rejected a non-discrimination amendment to the National Housing Act and yet not be opposed to state laws achieving the same result. It would be unsound, therefore, to conclude that the Law Against Discrimination invades a legislative area preempted by Congress.

VII

Finally, plaintiffs argue that the statute in question conflicts with the National Housing Act and hence is invalid under the supremacy clause of the Federal Constitution, Article VI, paragraph 2. Insofar as this argument rests on a supposed frustration by the Law Against Dis-

crimination of a congressional policy of permitting discrimination with respect to FHA insured housing, it is sufficient to point to our discussion of the argument concerning federal preemption, above, where we hold that Congress did not intend to exempt FHA insured housing from the operation of state laws prohibiting discrimination with respect to such housing. Unlike in *Johnson v. State of Maryland*, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920); *Leslie Miller, Inc. v. State of Arkansas* 352 U.S. 187, 77 S.Ct. 257, 1 L.Ed.2d 231 (1956), and *Public Utilities Comm. of State of Cal. v. United States*, 255 U.S. 534, 78 S.Ct. 446, 2 L. Ed.2d 470, rehearing denied 356 U.S. 925, 78 S.Ct. 713, 2 L.Ed.2d 760 (1958), cited by plaintiffs as supporting their position, there is no conflict between state and federal power which might undermine the intent or purpose of the federal law or operation. Cf. *Stuyvesant Town, Inc., v. Ligham*, 17 N.J. 473, 486, 111 A.2d 744 (1955). Thus the statute creates no difficulties

under Article VI, paragraph 2 of the United States Constitution.

CONCLUSION

We hold, therefore, that the public assistance rendered to the housing in question places it within the purview of the Law Against Discrimination and that the Division Against Discrimination in the State Department of Education has jurisdiction to hear and decide the charges brought against plaintiffs by the individual defendants, and that the statute on which the jurisdiction is based is valid. Thus the relief sought by plaintiffs in their action in lieu of prerogative writs cannot be granted, and the cause must be returned to the Division Against Discrimination in the State Department of Education for disposition. The judgments appealed from are affirmed.

For affirmance: Justices BURLING, JACOBS, FRANCIS, PROCTOR, HALL and SCHETTINO—6.

For reversal: None.

INDIANS

Inheritance—Federal Statutes

Joe HAYES v. Fred A. SEATON, Secretary of the Interior.

United States Court of Appeals, District of Columbia Circuit, July 9, 1959, Rehearing Denied, October 5, 1959, 270 F.2d 319.

SUMMARY: Joseph Thomas, an Indian, disappeared in 1939, and has not been heard from since. His father, John Thomas, died in 1940 naming his son as principal heir. The Secretary of the Interior decided that the son survived the father and took his estate, and that the son's heirs took both estates. Under the statute, the secretary "... upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive." The heir of the father, who would take the estate if the father were determined to have died first, contested the ruling in federal court. The complaint was dismissed. On appeal, the Court of Appeals for the District of Columbia affirmed, holding that the Secretary acted within the scope of his authority, and that under the terms of the statute the court has no power to disturb his decision. One justice dissented.

INDIAN RESERVATIONS

Jurisdiction—Colorado

Clifford Becher WHYTE v. DISTRICT COURT OF MONTEZUMA COUNTY, Colorado, John H. Galbreath, as Judge Thereof, and Irene Clark Whyte.

Supreme Court of Colorado, En Banc, September 21, 1959, 346 P.2d 1012.

SUMMARY: In an original proceeding before the Colorado Supreme Court, a petitioning Ute Indian alleged that his Ute Indian wife, whom he had married and lived with on the tribal reservation, had filed suit for a divorce and property division in a state district court; that he had moved to dismiss for lack of jurisdiction of the parties as members of a tribe of treaty Indians over whom the state had not acted affirmatively to accept jurisdiction in accordance with a congressional Act of 1953; that respondents were interfering with the exclusive jurisdictional rights of duly constituted tribal courts to determine controversies of tribal members; but that the respondent district court judge had overruled the motion. The supreme court issued a rule to respondents to show cause why the divorce action should not be prohibited. The answer alleged jurisdiction in the district court because the parties were domiciled within that judicial circuit. The supreme court made the rule absolute. Noting United States Supreme Court decisions that under the federal constitution the federal government has plenary jurisdiction over Indian affairs, not subject to diminution by the states in the absence of specific congressional grant of authority to them to act, and that state laws therefore have no force within an Indian tribe's territory in matters affecting Indians, the court ruled that as Colorado had not taken the steps specified in the 1953 Act to accept jurisdiction in Indian affairs, the district court was without jurisdiction to hear and proceed to judgment in the divorce action.

MOORE, Justice.

This is an original proceeding in which a rule issued, directed to the above named respondents, to show cause why the relief prayed for by petitioner should not be granted.

Petitioner alleges that he and the respondent Irene Clark Whyte are members of the Ute Mountain Tribe of the Ute Mountain Reservation Indians; that at all times material to the issues presented each of them was a duly enrolled Indian of said reservation; that respondent Irene Clark Whyte filed a complaint in divorce in the district court of Montezuma county, Colorado, in which she alleged that she and petitioner were married at Towoac, Colorado, on August 5, 1952. Towoac is within the boundaries of the Indian reservation. Petitioner further alleges that he filed a motion to dismiss the divorce action on the ground that the court lacked jurisdiction because the parties to said action were members of the Ute Mountain Tribe of the Ute Mountain Reservation and that they were domiciled on said reservation; that the respondent judge overruled the motion to dismiss; that the members of the Ute Mountain Tribe of the Ute Mountain Reservation Indians are treaty Indians and the State of Colorado has not acted affirma-

tively to accept jurisdiction over said treaty Indians in accordance with the provisions of the Act of August 15, 1953, c. 505, Sec. 6-7; 67 Stat. 590, 28 U.S.C.A. § 1360 note. It is further alleged that the state court has no jurisdiction over the parties or the subject matter of the action and that the sole jurisdiction to determine the controversy between the parties rests in the tribal court of said tribe of treaty Indians; that in the divorce action respondent Irene Clark Whyte seeks a division of property, support money and attorneys' fees. Petitioner alleges that the control of allotted tribal funds is involved, as well as the enforcement of a treaty between the United States and a sovereign nation of Indians, and that the rights of a tribe of treaty Indians to pass upon the legal rights of its members in duly constituted tribal courts is being interfered with by the respondents.

Respondents by answer admit generally the facts set forth in the petition; allege that the petitioner and the plaintiff in the divorce action were "at all times pertinent hereto domiciled in the State of Colorado, residing within the boundaries of the County of Montezuma and the Sixth Judicial District"; and alleged that the district court has "full jurisdiction of the parties and the subject matter involved" in the divorce

action. As a second return to the rule respondents allege the following:

"1. That by its Enabling Act the State of Colorado was granted and, through adoption of its Constitution, accepted general civil jurisdiction of Indian Reservations within its boundaries and, further, that the Federal Government has not retained nor asserted jurisdiction of the matter herein involved.

"2. That the Tribal Court of the Ute Mountain Tribe has no jurisdiction of divorce proceedings involving a common law or tribal custom marriage such as the one concerned in Civil Action No. 2791 sought to be prohibited.

"3. That under the Constitution and laws of the United States and the Constitution and laws of the State of Colorado, the respondent Court has full jurisdiction of petitioner Clifford Becher Whyte and respondent Irene Clark Whyte, and of the subject matter of Civil Action No. 2791."

The question to be determined is whether the respondent court has jurisdiction to proceed to judgment in the divorce action. If answered in the affirmative the rule should be discharged. If the answer is in the negative the rule should be made absolute.

[Authority of Congress]

The Congress of the United States and the duly constituted officers of the federal government since adoption of the Constitution have had the power to regulate dealings with the Indians. The Supreme Court of the United States, speaking through Chief Justice John Marshall in *Worcester v. State of Georgia*, 6 Pet. 515, 31 U.S. 515, 8 L.Ed. 483, said:

"[The Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restriction on their free actions. The shackles imposed on this power, in the confederation, are discarded."

Under the Constitution of the United States the jurisdiction of the federal government over all

Indian affairs is plenary and subject to no diminution by the states in the absence of specific congressional grant of authority to them to act. *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410; *Perrin v. United States*, 232 U.S. 478, 34 S.Ct. 387, 58 L.Ed. 691.

As a corollary to federal sovereignty it is clear that state laws have no force within the territory of an Indian tribe in matters affecting Indians. *Patterson v. Council of Seneca Nation*, 245 N.Y. 433, 157 N.E. 734; *Blanset v. Cardin*, 256 U.S. 319, 41 S.Ct. 519, 65 L.Ed. 950; *Dole v. Irish*, 2 Barb., N.Y., 639; *Oklahoma Land Co. v. Thomas*, 34 Okl. 681, 127 P. 8; *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820; *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962. As stated by Cohen in his *Federal Indian Law* at page 120: "It is well settled that the state has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the federal government."

The case of *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 272, 3 L.Ed.2d 251, decided by the Supreme Court of the United States January 12, 1959, is the last word on the subject under consideration. We think it controls the instant action. In that case the court held that where a white man entered into a contract with a Navajo Indian on a Navajo Reservation in Arizona, the state courts of Arizona were without jurisdiction to grant relief in an action to recover the agreed price for goods sold by the white man to the Indian. The court's opinion contains the following pertinent language:

"There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. (cit. om.) The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."

We are in accord with the argument of counsel for petitioner as set forth in their brief:

"Surely, if a non-Indian's rights under a contract made with an Indian on an Indian reservation are subject to the exclusive jurisdiction of the tribal court, it must follow that a contract of marriage entered into on an Indian reservation between two enrolled members of the tribe must be governed by tribal law. The right to determine this dispute arising under the marriage contract is a right reserved to the sovereign nation of the Ute Mountain Tribe of the Ute Mountain Reservation Indians. That right was reserved by treaty with the United States, and, although Congress has now provided a way in which the states can assume the burdens and the jurisdiction over Indian affairs, Colorado has not taken the requisite affirmative action required by Congress. As was said by Justice Black in *Williams v. Lee*, supra, 'To date, Arizona (Colorado) has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable.' Not having accepted the jurisdiction, together with its correlative burdens, the State of Colorado and its courts cannot attempt to determine the rights of two enrolled members of the Ute Mountain Tribe of the Ute Mountain Reservation Indians under a marriage contract entered into on the Indian reservation. Only the tribal courts have jurisdiction, and respondents should be enjoined from proceeding further with the state court divorce action."

Respondents seek to distinguish *Williams v. Lee*, supra, from the instant case on several grounds: One claimed distinction is that the Arizona Constitution contains a disclaimer of jurisdiction over Indian lands, whereas the Colorado constitution does not. True, Colorado did not disclaim, but it is entirely clear that this failure to do so cannot conceivably result in Colorado jurisdiction over Indian affairs. For instance, in *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820, the defendant, a white man, was charged in federal court under a federal statute, with the murder of a Klamath Indian on that tribe's reservation. Defendant contended that the California state courts had jurisdiction because California was admitted to

the Union on the same basis as the original thirteen states, with no reservation by Congress of jurisdiction over Indian lands. The Supreme Court rejected this argument, ruling that the state court was without jurisdiction.

[Congressional Action Is Key]

The test is not whether a state has disclaimed jurisdiction, but whether Congress has authorized such a jurisdiction within the state. In 1953 Congress adopted an Act (18 U.S.C. § 1162) which granted to all states the privilege of qualifying for such jurisdiction in Indian affairs. This statute provides in part:

"Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, *their State constitution or existing statutes*, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provision of this Act: Provided, That the provisions of this Act *shall not become effective* with respect to such assumption of jurisdiction by any such State *until* the people thereof have appropriately *amended* their State constitution or statutes as the case may be.

"The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or *civil causes of action*, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, *by affirmative legislative action*, obligate and bind the State to assumption thereof." (Emphasis supplied.)

Colorado has not taken the steps mentioned in the statute which are essential prerequisites to jurisdiction in this case.

Another claimed distinction is that the Ute Reservation is within the exterior boundaries of the State of Colorado; but so is every other Indian reservation within the boundaries of one or more states. *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869, upon which respondents rely in this connection is clearly distinguishable on the facts. The additional fact that the General Assembly included the Indian reservation within the territorial boundaries of counties, vot-

ing precincts, and judicial districts, does not alter the result. The Arizona Indians reservation involved in *Williams v. Lee*, supra, is also within such boundaries. *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456; *Denison v. State*, 34 Ariz. 144, 268 P. 617.

Our conclusion is that the respondent District Court was without jurisdiction to hear the divorce action, and the question hereinabove propounded is answered in the negative.

The rule is made absolute.

DAY, J., not participating.

INDIANS

Jurisdiction—United States Courts

Mary MARTINEZ v. SOUTHERN UTE TRIBE, a corporation.

United States Court of Appeals for the Tenth Circuit, January 7, 1960, 273 F.2d 731.

SUMMARY: Plaintiff, the daughter of a fullblooded Indian, was accepted and recognized as a member of the Southern Ute tribe for many years. About 1950, she was excluded from the reservation and denied rights as a member of the tribe, including medical care, education and a share in the tribal holdings. She filed suit in the United States district court in Colorado to restore her status. That court dismissed the suit for want of jurisdiction. The Court of Appeals for the Tenth Circuit affirmed the dismissal, holding that in the absence of a specific federal statute, federal jurisdiction of a civil action between members of the tribe does not exist merely because the parties are Indian. 249 F.2d 915, 3 Race Rel. L. Rep. 527; *cert. denied*, 356 U.S. 960, 78 S.Ct. 998, 3 Race Rel. L. Rep. 423. Subsequently plaintiff filed a new suit in the same district court, contending that the statutes which provide for the approval of the Secretary of the Interior of payments of tribal funds made the action a controversy "arising under the laws of the United States." The court dismissed the case as presenting the same claim and prayer as the earlier case. The Court of Appeals for the Tenth Circuit affirmed, holding that plaintiff's claim does not depend on the construction of federal statutes, but rather turns on the issue of her membership in the tribe, over which determination the tribe has complete authority.

INDIANS

Jurisdiction—United States Courts

Application for a Writ of Habeas Corpus of Kennedy CHARLEY v. B. J. RHAY, Superintendent of Washington State Prison.

Supreme Court of Washington, Dept. 1, February 4, 1960, 348 P.2d 977.

SUMMARY: An Indian was tried and convicted of second-degree burglary in a Washington state court and sentenced to prison. He subsequently applied for a writ of habeas corpus, contending that burglary was one of the ten major crimes which sections 1151 and 1153 of 18 U.S.C.A. provide are exclusively within the jurisdiction of federal courts when committed by Indians in "Indian Country." On the findings of the trial court that the crime fell within the statutory definition as to nature and location, the Supreme Court of Washington granted the writ and the prisoner was released.

INDIANS**Reservation Privileges—New York**

Application of Henry A. FISCHER, Jr., District Attorney of Franklin County, for an Order under Section 8 of the Indian Law to remove John Tebo from the St. Regis Indian Reservation as an Intruder. John Tebo, Appellant, Henry A. Fischer, Jr., Respondent.

Supreme Court of New York, Appellate Division, Third Department, December 31, 1959, 194 N.Y.S.2d 772.

SUMMARY: A member of the St. Regis Indian tribe, a United States citizen by birth in New York but a member of the tribe's Canadian branch receiving benefits attached to the branch by having elected to have his name appear on its rolls, entered the American branch's separate reservation in New York and bought land therein. Pursuant to statute, the American chiefs, who had not granted him reservation privileges, requested the district attorney to remove him as an intruder. The county court overruled an objection to its jurisdiction and found that the individual complained of was a member of the Canadian branch and therefore subject to removal. On appeal, the supreme court, appellate division, affirmed. It was held that, under a treaty of 1796 and New York statutes, the county court has jurisdiction over such a controversy involving the American branch of the tribe, the Canadian branch having relinquished all rights to land in New York. On the merits, the court concluded that, although the individual complained of had a theoretical right to live on a St. Regis tribal reservation, inasmuch as the American and Canadian branches are separate and distinct and as it is the law's intention that the American branch should have the right to decide who is entitled to live on its reservation, the action taken by the chiefs was within their authority and was based on sound reasons when the individual complained of had already elected to be a part of the Canadian branch.

HERLIHY, Justice.

The St. Regis Indians are divided territorially and otherwise by the St. Lawrence River and the International boundary line. The American branch is located in Franklin County a short distance downstream from the St. Lawrence Seaway. The Canadian branch, a separate and complete entity, is located in the province of Quebec, opposite the American branch. Aside from the name there is no community of rights or privileges. A member of one branch is not a member of the other although originally part of the same tribe.

[Facts Reviewed]

The facts are not in dispute. Appellant Tebo is an American citizen, born at Elizabethtown, New York. He and his parents for many years were members of the Canadian tribe; received the benefits attached thereto and their names appeared on the tribal rolls. They have never been entitled to receive any benefits which accrued to the American branch nor has petitioner ever received permission from the chiefs to reside on the reservation in Franklin County. In 1956, under these circumstances, Tebo entered

the American reservation and bought, without permission, four acres of land from one of the American members. When he started to build thereon, the chiefs of the American branch, pursuant to Section 8 of the Indian Law, requested the District Attorney to remove Tebo as an intruder. Upon such written complaint, the law is mandatory that the District Attorney initiate such proceedings, and if the County Judge determines that the subject is an intruder, he must sign an order of removal. Tebo appeared specially to contest the jurisdiction of the court, contending that the St. Regis tribe was governed by the Treaty of 1794, 7 Stat. 44, which granted to the people of the Six Nations the sole right to govern themselves without interference by the courts, also that the court could not settle jurisdictional disputes as to property within the reservation and that the elective chiefs who filed the complaint did not lawfully represent the American branch of the tribe. The court overruled these objections, determining that the Treaty of 1796, 7 Stat. 55—not 1794—was applicable to the American branch of the St. Regis Indians; that Section 106 of the Indian Law did not preclude the court from finding Tebo an intruder and that the Legislature of the State of New

York provided the manner and method for the election of chiefs and there was no evidence before the court of noncompliance with the law—Section 110 of the Indian Law. Section 106, mentioned herein, governs jurisdiction of Council of Chiefs to determine disputes.

In a subsequent opinion, dated January 15, 1958, the County Court determined the merits of the controversy, holding that Tebo was a member of the Canadian branch and as a consequence he was an intruder subject to removal and so ordered. The court made no finding concerning the real property rights.

[Treaty of 1796 Governs]

From a reading of the two treaties involved, set forth in the record, it conclusively appears that the Treaty of 1796 was intended to govern the St. Regis Indians. Not only does it refer to the tribe by name but provides, among others, for the tract of land now known as the St. Regis Reservation in Franklin County. The Treaty further provided for the State of New York to compensate the seven Canadian tribes and they relinquished all their rights to lands within the State. In recent years there has been considerable litigation as to Indian property—perhaps due to its close proximity to power and water developments—and that the St. Regis Indians were part of the Seven Nations Treaty made in 1796 seems to be authoritatively settled. *St. Regis Tribe of Mohawk Indians v. State of New York*, 5 N.Y.2d 24–29–32–37–40, 177 N.Y.S.2d 289–291–294–298–301, certiorari denied 359 U.S. 910, 79 S.Ct. 586, 3 L.Ed.2d 573, rehearing denied 359 U.S. 1015, 79 S.Ct. 1146, 3 L.Ed.2d 1039. We determine in this action that such treaty governs.

While the petitioner claims that any dispute as to the real property within the reservation must be decided by the Tribal Council pursuant to Section 106, the issue is not pertinent on this appeal as the County Court made no such finding. Whatever the law may have been, it is now decided that under Section 8 of the Indian Law not only is the question of an intruder

determined, but the question of title to reservation lands, if necessary, may likewise be determined. Said the court: "In short, the County Court, having jurisdiction of the parties and the proceeding, had power under section 8 to decide the issue of ownership." *Brenner v. Great Cove Realty Co.*, 6 N.Y.2d 435–444, 190 N.Y.S.2d 337, 343.

In further reliance upon the Treaty of 1794, appellants argue that Sections 108–113 of the Indian Law are unconstitutional. These Sections involve the procedure and election of officers—chiefs—of the tribe of St. Regis Indians in New York State. Having already determined that the Treaty of 1794 does not govern the St. Regis tribe, there is no merit to the argument and no necessity for further discussion.

[Chiefs' Action Upheld]

As to the merits, Tebo, a St. Regis Indian, is theoretically entitled to live on a reservation of the tribe. Section 8 provided in part: "Except as otherwise provided by law, no person shall settle or reside upon lands owned or occupied by any nation . . . of Indians, except members of such nation." However, Tebo and his family, although citizens of the United States, elected to become part of the Canadian branch, were so accepted and their names appeared upon its rolls. As previously observed, although part of the same tribe, the two branches are separate and distinct and the action taken by the American chiefs—refusing to allow Tebo the privileges of the American reservation—was within their authority and classifying him as an intruder was premised on sound reasons. Tebo, having made the election in the first instance, cannot now be heard to complain. It appears to be the intent of the law that the St. Regis Indians, American branch, should have the right to determine who is entitled to live on its reservation. *Matter of Herne*, 133 Misc. 286, 232 N.Y.S. 415.

The order of the County Court should be affirmed.

Order of the County Court affirmed, without costs.

ORGANIZATIONS

Legislative Investigation—United States

Carl BRADEN v. UNITED STATES of America.

United States Court of Appeals, Fifth Circuit, December 10, 1959, 272 F.2d 653.

SUMMARY: An official of several organizations purporting to promote racial integration in the South was subpoenaed by a subcommittee of the House of Representatives Committee on un-American Activities holding hearings in Atlanta, Georgia, and was asked questions as to membership in and connection with the Communist party and alleged Communist front organizations, and also as to his associations with an alleged member of the Communist party. When he refused to answer a question on the grounds that it was not pertinent to matters under investigation and that it was an invasion of his freedom of association under the First Amendment, he was told that the Committee was informed that he had been "masquerading behind a facade of humanitarianism" in order, as a Communist, to propagate Communist activity and the Communist line principally in the South. Upon further refusal to answer questions, he was indicted and convicted in a federal district court in Georgia of contempt of Congress. On appeal, the Court of Appeals for the Fifth Circuit affirmed. Appellant asserted that the Committee had not called him for any legislative purpose but rather for the purpose of "harrassing and exposing" him because of his support of integration and civil rights and his opposition to the Committee and to pending legislation. The court rejected this line of argument, stating that "Legislative purposes might well be furthered by a determination of whether organizations ostensibly active in championing timely objectives, such as integration and civil rights, are in fact being used for the spread of the propaganda of a foreign dominated Communist organization with subversive designs upon our governmental system." It was held that appellant had no right under the First Amendment to refuse to answer the propounded questions.

Before HUTCHESON, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge.

The appellant, Carl Braden, was convicted of each of the six counts of an indictment charging contempt of Congress under 2 U.S.C.A. § 192,¹ arising from his refusal to answer certain questions at a hearing of a Subcommittee of the Committee on Un-American Activities of the House of Representatives. He has appealed from the conviction.

Complying with a subpoena, the appellant appeared before the Subcommittee in Atlanta, Georgia. He was accompanied by two attorneys. After being sworn the appellant identified him-

self as Field Secretary of the Southern Conference Fund, Inc., which, he said, was "a southwide interracial organization working to bring about integration, justice and decency in the South." He was also the associate editor of the Southern Patriot, a newspaper published by the Southern Conference Educational Fund which, said the appellant, "disseminates information on integration in the South and about the people who are working for integration." The appellant testified that the subpoena of the Committee had been served on him while he was visiting in Rhode Island. In reply to a question of counsel for the Committee, he stated that he was visiting Harvey O'Connor, National Chairman of the Emergency Civil Liberties Committee. He was asked to state the point from which he departed to the State of Rhode Island. The appellant expressed the belief that the question was not pertinent to any question that the Committee might be investigating, and that the question was an invasion of his right to associate under the First Amendment. He declined to answer. The Committee counsel gave

1. "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."

the appellant an explanation of the pertinency of the question, saying:

"Sir, it is our understanding that you are now a Communist, a member of the Communist Party; that you have been identified by reputable, responsible witnesses under oath as a Communist, part of the Communist Party which is a tentacle of the international Communist conspiracy. It is our information further, sir, that you as a Communist have been propagating the Communist activity and the Communist line principally in the South; that you have been masquerading behind a facade of humanitarianism; that you have been masquerading behind a facade of emotional appeal to certain segments of our society; that your purpose, objective, your activities, are designed to further the cause of the international Communist conspiracy in the United States. . . ."

The Chairman of the Subcommittee ruled that a foundation had been laid establishing the pertinency of the question and directed the appellant to answer. The appellant again refused to answer stating that his beliefs and his associations were none of the business of the Committee and asserting that his refusal to answer was "on the grounds of the first amendment of the United States Constitution, which protects the rights of all citizens to practice beliefs and associations, freedom of the press, freedom of religion, and freedom of assembly."

The appellant was shown a letter² on the letterhead of Southern Conference Educational

2. "Dear Friend:

"We are writing to you because of your interest in the Kentucky 'sedition' cases, which were thrown out of Court on the basis of a Supreme Court decision declaring state sedition laws inoperative.

"There are now pending in both houses of Congress bills that would nullify this decision. We understand there is a real danger that these bills will pass.

"We are especially concerned about this because we know from our own experience how such laws can be used against people working to bring about integration in the South. Most of these state statutes are broad and loosely worded, and to the officials of many of our Southern states integration is sedition. You can imagine what may happen if every little local prosecutor in the South is turned loose with a state sedition law.

"It is small comfort to realize that such cases would probably eventually be thrown out by the Supreme Court. Before such a case reaches the Supreme Court, the human beings involved have spent several years of their lives fighting off the attack, their time and talents have been diverted

Fund. He admitted that it bore the signatures of his wife and himself. He was asked, "Were you a member of the Communist Party the instant you affixed your signature to that letter?" The refusal to answer this question is the charge of Count Five.

. . . .

Following the verdict of guilty upon each of the six counts, concurrent sentences of twelve months imprisonment on each of the counts were imposed. Motions in arrest of judgment and for a new trial were made and denied.

The assertion is made on behalf of the appellant that he was not called before the Committee for any legislative purpose but rather for the purpose of harassing and exposing him because of his support of integration and civil rights and his opposition to the Committee and to pending legislation. Investigations can be made by the Congress only as to matters which are proper subjects for legislation by it. There is no congressional power to expose for the sake of exposure. *Watkins v. United States*, 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273; *Barenblatt v. United States*, 360 U.S. 109, 79 S. Ct. 1081, 3 L.Ed.2d 1115. The opening statement of the Committee Chairman showed a purpose of investigating current subversive Communist techniques in the South. Legislative purposes might well be furthered by a determination of whether organizations ostensibly active in championing timely objectives, such as integration and civil rights, are in fact being used for the spread of the propaganda of a foreign dominated Communist organization with subversive designs upon our governmental system. If a Congressional Committee ascertained that Communists were attempting to create an appearance of respectability for Un-American activities by seeking the shelter of such an honored and honorable institution as the American Red Cross,

from the positive struggle for integration, and money needed for that struggle has been spent in a defensive battle.

"It should also be pointed out that these bills to validate state sedition laws are only a part of a sweeping attack on the U.S. Supreme Court. The real and ultimate target is the Court decisions outlawing segregation. Won't you write your senators and your congressman asking them to oppose S. 654, S. 2646, and H.R. 977. Also ask them to stand firm against all efforts to curb the Supreme Court. It is important that you write—and get others to write—immediately, as the bills may come up at any time.

"Cordially yours,

"Carl and Anne Braden"

that fact would be pertinent to the inquiry it was making.

[Appellant's Associations]

There was a close relationship shown between the appellant and Harvey O'Connor, who was known to the Committee as a hard-core member of the Communist Party. O'Connor was identified as the National Chairman of the Emergency Civil Liberties Committee which was stated to be a Communist front organization. The activities of that organization, with which the appellant would have been familiar if he was associated with O'Connor in the development for it of plans and strategies, were pertinent to the investigation being made by the Committee.

We need not make any analysis of the pertinency of the questions upon which other counts of the indictment were based. The sustaining of the appellant's conviction on any of the counts would require an affirmation since concurrent sentences were imposed. *Barenblatt v. United States*, supra; *Davis v. United States*, 6 Cir., 1959, 269 F.2d 357; *Estep v. United States*, 5 Cir., 1955, 223 F.2d 19, certiorari denied 350 U.S. 862, 76 S.Ct. 105, 100 L.Ed. 765; *Gilmore v. United States*, 5 Cir., 1955, 228 F.2d 121; *Morales v. United States*, 5 Cir., 1956, 228 F.2d 762.

While before the Committee, the appellant's refusals to answer were frequently accompanied by statements or suggestions that the Committee's purpose was the investigation of integration. But one who is known or believed to be a Communist and is suspected of being engaged in Un-American activities does not acquire immunity by adopting the role of a racial integrationist.

[Refusal to Answer Defended]

During the appearance of the appellant before the Committee he stated his claim of right in refusing to answer the Committee's questions by saying, "I am standing on the *Watkins*,³ *Sweezy*,⁴ *Konigsberg*,⁵ and other decisions of the Supreme Court which protect my right, and the Constitution as they interpret the Constitution of the United States to private belief and association."

3. *Watkins v. United States*, supra.

4. *Sweezy v. State of New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311.

5. *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810, rehearing denied 354 U.S. 927, 77 S.Ct. 1374, 1 L.Ed.2d 1441.

Again he said, "I also believe it is an invasion of my right to associate under the first amendment and I therefore decline to answer." This position, taken at the Committee hearing is renewed here. It is apparent that the appellant misconceived the effect of the *Watkins* case. That this is so is clearly demonstrated by the opinion in the *Barenblatt* case from which we quote these excerpts:

"Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. When First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. . . ."

"That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society,' *Dennis v. United States*, 341 U.S. 494, 509, 71 S.Ct. 857, 867, 95 L.Ed. 1137. Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

. . . .

"We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of

the latter, and that therefore the provisions of the First Amendment have not been offended." 360 U.S. 109, 126, 127-128, 134, 79 S.Ct. 1081, 1091.

The foregoing principles are applicable and controlling here. The First Amendment does not give to the appellant any right to refuse

to answer the questions which were propounded to him by the Committee.

* * *

We do not find any error in the judgment and sentence or in the proceedings culminating therein. The judgment and sentence are Affirmed.

ORGANIZATIONS NAACP—Arkansas

NATIONAL ASSOCIATION FOR ADVANCEMENT OF COLORED PEOPLE v. Bruce BENNETT, Attorney General of State of Arkansas.

United States District Court, Eastern District, Arkansas, Western Division, October 8, 1959, 178 F.Supp. 191.

SUMMARY: The National Association for the Advancement of Colored People brought suit in federal court against the Arkansas Attorney General and others to restrain enforcement of state barratry and maintenance statutes and statutes authorizing state officials to compel filing of certain information by organizations engaged in activities designed to interfere with state control and operation of schools, and authorizing the Attorney General to visit the offices of such organizations and there to inspect records and otherwise procure evidence of tax evasion or other illegal activity. [These statutes appear in 3 Race Rel. L. Rep. 1053, 1057, 1054, and 1056 (1958)]. Defendants moved to stay proceedings until state courts could rule upon the validity of the statutes involved. Citing United States Supreme Court rulings that, where an unconstrued statute is attacked in a federal district court as violative of the federal Constitution, proceedings should be stayed until state courts have construed the meaning and scope of the statute, the three-judge district court held that comity in federal-state judicial relations required the application of this doctrine even if it be assumed that the statutes in question were obviously unconstitutional. The motion to stay was therefore granted. 178 F.Supp. 188, 4 Race Rel. L. Rep. 349 (E.D. Ark. 1959). The United States Supreme Court vacated the judgment and remanded the case "for consideration in light of *Harrison v. NAACP*" [360 U.S. 167, 4 Race Rel. L. Rep. 527 (1959)], stating that when a state statute is challenged as violative of the United States Constitution, "reference to the state courts for construction of the statute should not automatically be made." 360 U.S. 471, 4 Race Rel. L. Rep. 254 (1959). On remand, the district court interpreted the *Harrison* decision to mean that "a reference to the State courts should be made where the challenged statute is fairly open to construction." The court noted that the NAACP now concedes that the barratry and maintenance statutes are reasonably susceptible of a construction by state courts which might avoid in whole or part the necessity for federal constitutional adjudication or which might change materially the nature of the problem. And the court held that whether or to what extent the other two statutes apply to the NAACP is purely a question of state law that could be answered authoritatively only by the state supreme court, which presumably would do its full constitutional duty and in so doing might construe them so as to surround their application with such procedural safeguards as would protect the legitimate rights and interests of the NAACP and its members. Noting that the NAACP did not appear to be in imminent danger of having either statute enforced against it before it could secure state adjudication, the court adhered to its original order granting the motions to stay, and retained jurisdiction until efforts by the NAACP to obtain a state court adjudication shall have been exhausted.

Before SANBORN, Circuit Judge, and MILLER and HENLEY, District Judges.

PER CURIAM.

This is an action brought by the National Association For The Advancement of Colored People (NAACP) against the Attorney General of the State of Arkansas and the County Judges and Prosecuting Attorneys of Pulaski and Jefferson Counties in that State for a declaratory judgment to the effect that Acts 12, 13, 14 and 16 of the Second Extraordinary Session of the 61st General Assembly of the State of Arkansas, 1958, are violative of the 14th Amendment to the Constitution of the United States, and to restrain the enforcement of those statutes. Subsequent to the filing of the complaint, the defendants filed motions to stay proceedings in this Court until said statutes had been authoritatively construed by the Supreme Court of Arkansas, which motions were resisted by the plaintiff.

[Motions to Stay Granted]

On January 17, 1959, the motions were heard by this statutory three-judge court (28 U.S.C.A. § 2281 et seq.) and were granted.¹ In the course of the argument plaintiff placed heavy reliance upon the decision of the district court in *N.A.A.-C.P. v. Patty*, D.C.Va., 159 F.Supp. 503, holding that where State statutes challenged upon federal constitutional grounds are clear and unambiguous, the federal courts should proceed to pass upon the constitutional questions presented without awaiting prior action by the State courts. It was the position of the plaintiff that the statutes were clear and unambiguous, that they presented no problems of construction, and that the court should proceed to determine their validity under the federal constitutional provision above mentioned.

In rejecting the argument of the plaintiff this court relied upon the "general doctrine established by the Supreme Court in many cases . . . that where the constitutionality of an unconstrued state statute is challenged in a federal trial court as violative of the Federal Constitution, the court should stay its hand, but retain jurisdiction of the case until all doubts as to the meaning and scope of the statute have been resolved in the courts of the State". [178 F.Supp. 189.] And we cited *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971; *Spector Motor Service, Inc.*

v. McLaughlin, 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101; *Albertson v. Millard*, 345 U.S. 242, 73 S.Ct. 600, 97 L.Ed. 983; and *Government and Civic Employees Organizing Committee, C.I.O. v. Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed.2d 894.

[Rationale of Previous Decision]

While this court recognized that there is "respectable authority for the proposition that where the unconstitutionality of a statute is clear, it is unnecessary for the court to await state court adjudication", and cited *Patty*, supra, we went on to say:

"Assuming, without deciding, that the unconstitutionality of the Arkansas statutes in suit is obvious, as the plaintiffs claim, it reasonably can be believed that it would be more wholesome and more logical to permit the courts of Arkansas to rule upon their validity in the first instance than to have this court do so, and that it would be more in harmony with the philosophy underlying the doctrine established by the Supreme Court relative to the federal courts affording the state courts an opportunity to pass upon the construction and effect of local statutes.

"We think that under circumstances such as this court is confronted with, it has discretion as to whether it will proceed to an adjudication or whether it will require the plaintiff to seek its remedy in the courts of the State.

"We, therefore, grant the defendants' motions, and will 'retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted'".

From the order granting the defendants' motions the plaintiff appealed to the Supreme Court, and while the appeal was pending, the Court reversed the decision of the district court in the *Patty* case, supra, holding that the latter court should not have passed upon the validity of the Virginia statutes there involved until they had been construed by the courts of that State. *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed. 2d 1152.

[Decision Reversed]

Subsequently, however, on June 22 of the current year the Supreme Court also reversed the

1. In connection with this action the court filed a per curiam opinion 178 F.Supp. 188.

decision of this court, using the following language:

"When the validity of a state statute, challenged under the United States Constitution, is properly for adjudication before a United States District Court, reference to the state courts for construction of the statute should not automatically be made. The judgment is vacated and the case is remanded to the United States District Court for the Eastern District of Arkansas for consideration in light of *Harrison v. N.A.A.C.P.* * * *." *N.A.A.C.P. v. Bennett*, 360 U.S. 471, 79 S.Ct. 1192, 3 L.Ed.2d 1375.

The mandate of the Supreme Court having been filed in due course, this Court called for further briefs from the parties and again heard oral argument.

In its brief and argument the plaintiff concedes that Acts 14 and 16² are reasonably susceptible of a construction by the courts of Arkansas "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem". It is insisted, however, that Act 12 is similar to other Arkansas enactments that have been construed and upheld by the Arkansas Supreme Court, so that no substantial problem of construction is presented with respect to it; and it is urged that Act 13 is free from ambiguity and that "there is no construction to be placed on it to avoid the constitutional issue". Upon these premises, plaintiff prays that this court now proceed to pass upon the constitutionality of those two statutes.

[*Harrison Opinion Interpreted*]

It is clear from a reading of the opinion in *Harrison* that a reference to the State courts should be made where the challenged statute is fairly open to construction. The following language from that opinion is pertinent:

"According every consideration to the opinion of the majority below, we are nevertheless of the view that the District Court

should have abstained from deciding the merits of the issues tendered it, so as to afford the Virginia courts a reasonable opportunity to construe the statutes in question.
* * *

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments' * * * should at all times actuate the federal courts', *Matthews v. Rodgers*, 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447, as their 'contribution * * * in furthering the harmonious relation between state and federal authority' * * *. *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them * * *. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication. * * *

"The present case, in our view, is one which calls for the application of this principle, since we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.

"* * * All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court * * *, 360

2. Act 14 purports to define and punish barratry; Act 16 is entitled "An Act to Prohibit the Fomenting and Agitation and Litigation That Interferes With the Orderly Administration of Public Schools and Institutions of Higher Learning; To Prohibit The Solicitation, Receipt, or Donation of Funds for the Purpose Of Filing or Prosecuting Lawsuits; To Define Maintenance; To Provide a Penalty For any Violation Hereof; And For Other Related Purposes".

U.S. at pages 176-177 and 178, 79 S.Ct. at page 1030.

[Concessions and Assumptions]

When the motions for a stay of proceedings were before this Court originally, each side appeared to be willing to concede, for its own particular reasons, that the Arkansas statutes under consideration were free from ambiguity.³ In view of this apparent attitude on the part of both sides, we were willing to assume without deciding "that the unconstitutionality of the . . . statutes in suit is obvious . . .", and to base our decision on what we supposed to be our discretion in a case of this kind. That the Court was willing to indulge that assumption did not imply that its members in fact felt that said statutes do not involve questions of interpretation, or that they are not susceptible to any construction that would render them constitutional, or that they are obviously unconstitutional. On the contrary, the Court was convinced then and is convinced now that these enactments, including Acts 12 and 13, do require construction by the Arkansas courts, and that following such construction the federal constitutional questions either may not survive at all or may be posed in a different frame. As noted, the plaintiff itself now concedes such to be the case with respect to Acts 14 and 16.

[Act 12 Considered]

Taking up Act 12 first, its title is: "An Act To Provide Assistance In The Administration and Financing Of The Public Schools of Arkansas And For the Maintenance Of Law, Peace and Order In The Operation Of The Public Schools Requiring Certain Organizations To File Certain Information Under Oath In The County Clerk's Office Upon The Request Of The County Judge; Providing A Penalty For Violations and For Other Purposes".

The Act consists of eight sections, including a declaration of purpose (Section 1), a broad definition of the term "organization" (Section 2),⁴ a provision for the payment of a fee of \$2

3. The Attorney General of Arkansas, who argued in favor of the motions, appeared to be understandably reluctant to criticize the statutes as ambiguous or open to construction. The plaintiff, on the other hand, desired to stay in this court and avoid State court litigation; hence it was to its interest, at least at that time, to consider the enactments to be clear and unambiguous.

4. That definition is clearly broad enough to include the plaintiff and its local branches or chapters in Arkansas.

to the county clerk for recording the information called for by the statute (Section 6), a severability provision (Section 7), and an "emergency clause" (Section 8).

The declared purpose of the Act is "to provide for the maintenance of law, peace and order in the operation and administration of the public schools by requiring certain organizations engaged in activities designed to hinder, harass, and interfere with the powers and duties of the State of Arkansas to control and operate its public schools, and which activities may result in a serious disturbance of the public peace, to register and report certain information upon the request of the county judge". There is also a declaration that in the judgment of the General Assembly "the disclosure of such information is essential to the health, safety and general welfare of the people of Arkansas."

Section 3 of the Act provides that any "organization" functioning within any county in Arkansas and engaged "in activities designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public schools, upon the request of the county judge of such county shall file with the county clerk's office (certain information) subscribed under oath before a notary public, within seven days after such request is made . . ." The information to be furnished consists of: A. The official name of the organization and list of members. B. The office, place of business, headquarters or usual meeting place of the organization. C. The officers, agents, servants, employees or representatives of the organization. D. The organization's purpose or purposes. E. A statement disclosing whether the organization is subordinate to a parent organization, and, if so, the name of the parent organization.

Section 4 provides that the information furnished shall be a public record. And Section 5 provides that a violation of the statute shall be a misdemeanor, punishable by a fine of not less than \$50 nor more than \$200, and that each day of violation shall constitute a separate offense. It is further provided that all fines collected shall be forwarded to the State Treasurer and by him credited to the common school fund.

[A Question Arises]

When the operative section of the Act (Section 3) is considered, a question immediately arises as to whether the statute applies to the

plaintiff at all in view of the latter's stated aims and purposes as disclosed by the complaint and by plaintiff's certificate of incorporation, a copy of which document is attached to the complaint as an exhibit. Of course, if the statute does not apply to the plaintiff, then the latter has no standing to challenge its validity. Cf. *Harrison v. N.A.A.C.P.*, supra, 360 U.S. at page 177, 79 S.Ct. at page 1030.

The complaint alleges that the N.A.A.C.P. is a non-profit New York corporation; that its basic aims and purposes are to secure the elimination of all racial barriers which "deprive Negro citizens of the privileges and benefits of equal citizenship rights in the United States"; and that, as disclosed by its articles of incorporation, its principal objectives are as follows:

"* * * voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.

"To ascertain and publish all facts bearing upon these subjects and to take any lawful action thereon; together with any kind and all things which may lawfully be done by a membership corporation organized under the laws of the State of New York for the further advancement of these objects."

[Applicability of Act 12]

Obviously, the applicability of Act 12 to the plaintiff, its affiliated branches, and members depends upon whether their activities in pursuit of the organization's announced aims and objectives, which were said to be lawful in themselves in *Shelton v. McKinley*, D.C.Ark., 174 F. Supp. 351, 358, would be considered as "designed to hinder, harass and interfere with the powers and duties of the State of Arkansas to control and operate its public school", as that phrase is used in the statute. That is purely a question of State law, and can be answered authoritatively only by the Supreme Court of Arkansas. That Court may hold that all activities of the NAACP fall within the statute, or that none of them do, or that some do and some do

not. Until the scope of Section 3 has been authoritatively determined by the Supreme Court of Arkansas this Court cannot say that it is passing on something that is a "complete product of the State."

In the plaintiff's brief it is said: "As far as Act 12 is concerned, the Arkansas Supreme Court has already construed and upheld as valid several similar city ordinances on the ground that the state government has a right to see membership lists to aid in state tax enforcement and that such ordinances do not violate the federal constitutional right of free speech. *Bates v. City of Little Rock*."

[Bates and Williams Cases]

Bates and Williams involved ordinances of the cities of Little Rock and North Little Rock, respectively, which required organizations claiming immunity from municipal occupation taxes on the ground of the charitable nature of the organizations to furnish upon request certain information essentially similar to that required by Act 12. The appellant, Bates, was the president of the Little Rock Branch of the NAACP, and the appellant, Williams, held a similar position with the organization in North Little Rock. Both refused upon request to furnish their membership lists, although they did supply other pertinent information. On account of their refusal, they were prosecuted, convicted and fined \$25 each.

In upholding their convictions the Supreme Court of Arkansas said, among other things:

"The primary purpose of each of the ordinances here involved is to obtain revenue for the Cities, and the obtaining of the membership list and the listing of contributors is merely to aid in determining the matter of tax status. The NAACP is not being required to furnish any information other than that which is required of all other organizations seeking immunity from the payment of an occupation tax. The record here shows that the information required by the ordinances involved was required of all organizations claiming tax exemption; and the information was furnished by all of

5. *Bates v. City of Little Rock (Williams v. City of North Little Rock)*, Ark., 319 S.W.2d 37, certiorari granted 359 U.S. 988, 79 S.Ct. 1118, 3 L.Ed.2d 977.

the requested organizations except the NAACP.

"The NAACP is not being required to furnish any information other than is furnished by all other organizations claiming immunity from taxation. Furnishing membership lists of non-profit organizations in Arkansas, as a basis of being determined a non-profit organization, has been the rule in Arkansas since 1875."

"... If NAACP wants tax immunity, it should comply with the ordinance. It cannot have immunity from taxation without complying with the ordinance. This is but an application of the old statement that one cannot both eat his cake and keep it." 319 S.W.2d at pages 41, 42 and 43.

[Bates Decision not Helpful]

This court sees nothing in the Bates decision which sheds any light on how the Supreme Court of Arkansas will construe Act 12 as applied to the NAACP. The ordinances involved in that case applied to all organizations seeking tax exempt status; the NAACP was such an organization, and the ordinances were clearly applicable to it. In the instant case, on the other hand, it is certainly not obvious that the activities of the plaintiff come within the purview of the statute.

Moreover, regardless of what may be thought as to the bearing of Bates upon the problem in hand, that decision is 'not res judicata here, and the Supreme Court of Arkansas is certainly free to hold that the stated aims and purposes of the plaintiff do not amount to a prohibited interference with Arkansas' legitimate control and management of her public school system.

[Act 13 Considered]

Turning now to Act 13, Section 2 thereof provides that:

"If the Attorney General of the State of Arkansas should ascertain or have reason to believe that any organization or association, whether incorporated or not, has evaded, attempted to evade, or has defrauded the State of Arkansas of taxes due it under the laws of the State of Arkansas, he may, upon procurement of an order *ex parte* from any Chancery Court authorizing him and the

duly elected sheriff or his deputy to visit the office or headquarters of any organization or association, and there secure copies, photostatic or otherwise, reproduce, photograph, or otherwise, record any and all evidence found evidencing the fact that such organizations or associations has evaded or defrauded the State of Arkansas of the payment of the legal amount of taxes due and payable by such organization or association, or has otherwise violated any of the laws of the State of Arkansas."

Section 3 of the Act then goes on to provide that any person, firm or corporation refusing the Attorney General access to its files, records, correspondence or other data, may be summarily taken before the Court issuing the visitation order and there held in contempt of the Court's order. And Section 4 provides that any person "violating the provisions of Section 2" shall be guilty of a "misdemeanor of said refusal, and upon conviction thereof may be fined in a sum of not less than fifty dollars * * * nor more than five hundred dollars * * * plus imprisonment not to exceed a term of six months, or both fine and imprisonment". Section 5 provides that evidence procured pursuant to the provisions of the Act shall be admissible in all courts. Sections 6 and 7 need not be abstracted here. Section 8 is the emergency clause wherein it is found and declared by the Legislature "that certain organizations and associations have been hindering the orderly administration of the public schools and institutions of higher learning and have defrauded the State of Arkansas of the payment of certain taxes, and the passage of this act will alleviate such conditions".

Plaintiff says in its brief that Act 13 does not "meet even the rudimentary requirements of due process * * *" and that: "Upon a mere allegation that he has reason to believe that an organization is violating state tax laws, the Attorney General may procure an *ex parte* order authorizing him to search the offices of the organization for evidence that *any* law has been violated. The accused organization is then faced with the alternatives of surrendering its property or being summarily held in contempt without ever having had notice or the opportunity to be heard."

[Possible Constructions]

It is possible, of course, that the Arkansas courts might construe and apply the statute so as

to produce the results apprehended by the plaintiff; but, it is also possible that they may give the enactment a more limited construction and may surround its application with such procedural safeguards as to protect the legitimate rights and interests of the plaintiff, its affiliates and members, who can expect no more. After all, there is nothing inherently unconstitutional in the use of visitorial process to enforce the law or to secure evidence of violations thereof. Thus in *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 347-348, 29 S.Ct. 370, 378, 53 L.Ed. 530, the court said:

"It is insisted that the order to produce was so general and indefinite as to amount to an unreasonable search and seizure, and consequently was wanting in due process of law. But conceding, for the sake of argument only and not so deciding, that the due process clause of the 14th Amendment embraces in its generic terms a prohibition against unreasonable searches and seizures, a question hitherto reserved, under circumstances analogous to those here present, in *Consolidated Rendering Co. v. [State of] Vermont*, 207 U.S. 541, 28 S.Ct. 178, 52 L.Ed. 327, we think the ruling made in that case establishes the unsoundness of the contention. We say this because it was in that case determined, in view of the visitorial powers of a State over corporations doing business within its borders, and the right of the state to know whether the business of a corporation was being carried on in a lawful manner, that it was competent for the state to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the state had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents, and other employees of the corporation for like or analogous purposes."

[Order of Visitation Meaning?]

While the statute does not use the term "search warrant", it is open to the Supreme Court of Arkansas to say that the "order of visitation" provided for by the Act is, in effect, a special type of search warrant; and, if it so holds, then the procedural requirements of Arkansas' conventional constitutional prohibition against unreasonable searches and seizures must

be met prior to the issuance of such an order. The Arkansas Constitution, Article 2, Section 15, provides that a search warrant may not be issued "except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized." And, in *Ex parte Levy*, 204 Ark. 657, 163 S.W.2d 529, it was held that the issuance of a search warrant is a judicial act to be performed only by judicial officers, and by them only upon the conditions and under the circumstances stated in the provision of the Arkansas constitution above quoted.

That the "order of visitation" is to be obtained *ex parte*, as search warrants usually are, does not mean necessarily that it must be issued by the Chancellor as a matter of course. The State courts may well hold that before such an order may issue, the Attorney General must make a satisfactory showing that there is probable cause to believe that the plaintiff has in fact violated the State's tax laws or other valid enactment of the State. It may also be held that the Chancellor has some power to limit the scope of the visitation or to enter appropriate protective orders.

[Contempt Provisions]

As to the contempt provisions of the statute, this Court cannot say authoritatively whether the Arkansas courts will view a refusal to submit to a visitation order as a civil contempt, or as a criminal contempt committed outside the presence of the court, or whether in view of the use of word "summarily" in Section 3 they will treat such a refusal as a criminal contempt committed in the court's presence. It should be noted, however, that the word "summarily" modifies the phrase "taken before the Court" and not the phrase "held in contempt of the Court's order". If the Supreme Court of Arkansas characterizes the contempt as "civil", or as a criminal contempt committed outside the presence of the court, then clearly the alleged contemnor is entitled under Arkansas procedure to advance notice and hearing. See *Ark. Stats. § 34-903*; *Carl Lee v. State*, 102 Ark. 122, 143 S.W. 909; and *Ex parte Coulter*, 160 Ark. 550, 255 S.W. 15.

It must be kept in mind with regard to both statutes that there is no presumption that the courts of Arkansas will not do their full constitutional duty, or that they will act in an arbitrary

or capricious manner. Indeed, the presumption is the other way. See *Harrison v. N.A.A.C.P.*, supra, 360 U.S. at page 178, 79 S.Ct. at page 1031. That the plaintiff has a plain and adequate remedy in the State equity courts is made clear by the decision of the Supreme Court of Arkansas in *Smith v. Faubus*, Ark., 327 S.W.2d 562, 567, decided on September 14 of the current year, two days after the reargument in this case. That decision also indicates that said court will construe strictly the statutes in question, both of which contain penal provisions.⁶

6. The *Smith* case involved the validity of Acts 83 and 85 of the 1957 Arkansas General Assembly, which statutes had been attacked in the Arkansas courts by a group of Negro ministers after a three-judge federal court convened in this district declined to pass on said statutes in advance of State court adjudication. Act 83 is the statute creating the State Sovereignty Commission, and Act 85 required registration by persons who might solicit funds to be used in accomplishing, among other things, the passage of Congressional legislation "designed to limit or circumscribe in any manner the operation and control of school districts in Arkansas by the duly elected and qualified officers, directors, agents and employees of such school districts."

The latter Act was stricken down in its entirety as infringing upon a field that had already been preempted by the Congress. With regard to the State Sovereignty Commission, the Court held that the section of Act 83 giving broad visitorial powers to the Commission was invalid as a violation of Article 2, Section 15 of the Arkansas constitution, which provision has heretofore been mentioned. In upholding other sections, the Court said:

"The Sovereignty Commission has ample power under § 12 of the Act No. 83 to initiate investigations and summon witnesses. It can apply to the Court for *subpoena duces tecum*; and, under § 13

[Enforcement not Imminent]

The plaintiff does not appear to be in imminent danger of having either Act enforced against it before it can secure State adjudication. The Attorney General has indicated in the course of both arguments that he has no intention of moving precipitantly under Act 13, and although the statutes were enacted in September, 1958, no county judge has yet moved against the plaintiff under Act 12. Should any action be initiated against the plaintiff before it can secure a State court adjudication, this Court has jurisdiction to grant appropriate relief, since jurisdiction is being retained. See in this connection, *Harrison v. N.A.A.C.P.*, supra, 360 U.S. at page 179, 79 S.Ct. at page 1031. It goes without saying, of course, that the plaintiff cannot indefinitely avoid both a State interpretation of the statutes and an attempted enforcement thereof by failing to seek affirmative relief in the State courts.

It Is Therefore, Considered, Ordered and Adjudged that the Court adheres to its original order granting the motions to stay, and retains jurisdiction of this cause until efforts by the plaintiff to obtain an adjudication in the State courts shall have been exhausted.

of the Act, the Commission may apply to a court to enforce its desired process. As we understand §§ 12 and 13, the proper court may issue process and hear contempt matters on request of the Sovereignty Commission. As so understood, full judicial protection is accorded; and such is the orderly and constitutional manner of procedure."

PUBLIC ACCOMMODATIONS

Cemeteries—Minnesota

Ramona W. ERICKSON and David E. Erickson v. SUNSET MEMORIAL PARK ASSOCIATION, INC., a Minnesota Corporation.

District Court, Fourth Judicial District, Hennepin County, Minnesota, July 23, 1959, Case No. 541493.

SUMMARY: A Caucasian man and his American Indian wife purchased a burial lot from a Minnesota cemetery corporation having a rule restricting ownership or use of burial space to Caucasians. They had represented themselves to be Caucasians, and the corporate officer accepting their application did not know the wife's actual race. Conforming to the corporation's practice of some 30 years, the lot was conveyed to the applicants by a warranty deed containing a covenant restricting the lot's use to interment of deceased Caucasians. Subse-

quently, the corporation notified the wife that it could not permit the interment of non-Caucasians and would not permit the lot's use for her burial. The couple sought a state court adjudication of their right so to use the lot. It was held that the restrictive covenant in the deed and the corporation's policy upon which that covenant was based were contrary to the state's public policy as evidenced in legislation enacted in 1953 and 1957, prior to the events of this case. Public policy therefore prohibiting such racial discrimination, the court held that the couple's representation of the wife as a Caucasian, though contrary to fact, was not a material representation relating to an essential fact in the contract so as to justify a cancellation or a rescission on the grounds of unilateral mistake, or of fraud if it were a deliberate misrepresentation. It was accordingly ordered that plaintiffs are entitled to use the lot for their burial without racial discrimination and that defendant corporation has no right to interfere, because of race, with their use of it or to withhold from them any rights, privileges, or services arising out of the contract.

GUNN, Judge

The above entitled matter came duly on for hearing before the undersigned, one of the Judges of the above named Court, on the 21st day of April, 1959, in the Courthouse in the City of Minneapolis, County of Hennepin, State of Minnesota, upon the motion of plaintiffs for an order to enter judgment for plaintiffs on the pleadings in the above entitled action.

Sachs, Karlins, Grossman & Karlins, By Sheldon D. Karlins, Esq., and Richard F. Sachs, Esq., appeared as counsel for and in behalf of plaintiffs in support of said motion, and Carl K. Lifson, Esq., appeared as counsel for and in behalf of defendant in opposition thereto.

The Court, having considered the arguments and memoranda of counsel, upon all of the files and records herein, and being fully advised in the premises, makes the following Orders:

IT IS ORDERED that Judgment for Plaintiffs and against the Defendant be entered as follows:

1. That the plaintiffs, Ramona W. Erickson and David E. Erickson, and each of them, have the right and are entitled to use the property which they own in the defendant Sunset Memorial Park Association, for their burial without discrimination because of the race of the plaintiff, Ramona W. Erickson.
2. That the defendant Sunset Memorial Park Association, its officers and agents, have no right or privilege, because of the race of the plaintiff, Ramona W. Erickson, to interfere or hinder the plaintiffs, or either of them, in the otherwise proper use of their property herein for burial purpose.
3. That the defendant Sunset Memorial Park Association, its officers and agents, are not en-

titled, because of the race of the plaintiff, Ramona W. Erickson, to withhold from the plaintiffs, or either of them, any of the rights, privileges, or services arising out of this contract with the defendant, to which all other qualified lot owners are entitled.

4. For costs and disbursements as allowed by law.

Let the attached Memorandum be made a part of this Order. Dated at Minneapolis, Minnesota, this 23 day of July, 1959. 30-day Stay Granted.

MEMORANDUM

Plaintiff Ramona W. Erickson is a fullblooded American Indian and not a member of the Caucasian race. She is married to David E. Erickson who is a Caucasian.

Defendant Sunset Memorial Park Association, Inc., was organized under the Laws of the State of Minnesota in January 1899 as a cemetery association and has ever since been and now is a private corporation organized for pecuniary profit, limited by its corporate charter solely to the business of procuring and holding lands to be used exclusively for a cemetery, and the procuring, holding and operating of a crematorium, in which business it has been exclusively engaged since its corporate organization.

Defendant's existing cemetery, known as Sunset Memorial Park, is located in Hennepin County, Minnesota, and has been owned and operated by defendant since 1927. A plat of the said cemetery, as originally constituted, and with additions thereto, is duly filed and recorded with the Register of Deeds of Hennepin County. The cemetery of defendant is a public burying ground.

[Restrictive Covenant and Condition]

Since 1927 all deeds and contracts for deed executed and delivered by defendant to purchasers of burial space in defendant's cemetery have contained a covenant and condition limiting and restricting the use of the burial property described in each and every such deed and contract for deed to burial of persons of the Caucasian race. All such instruments have contained a provision whereby the conveyance of the property described therein was made "Subject to all the laws of the State of Minnesota, now or hereafter enacted for the management and regulation of cemeteries and also subject to all rules, regulations and by-laws of the said Association now or hereafter made for the regulation of the affairs of the same or any part thereof."

On July 22, 1938, defendant adopted a rule and regulation which is still in force and which provides as follows:

"Article II

"Ownership or use of burial space or cremation or interments in Sunset Memorial Park Cemetery shall be restricted to members of the Caucasian Race."

Many thousands of deeds have been executed and delivered by defendants to purchasers of burial lots and mausoleum space in defendant's cemetery since its opening in 1927. Thousands of such deeds have been issued both prior and subsequent to the year 1953. Defendant has outstanding a large number of contracts for deed, each of which contains a restrictive covenant and condition which limits the use of burial property or interment space designated in each such contract for deed to burial or interment of persons of the Caucasian race.

[Burial Lot Purchased]

On or about August 26, 1955, plaintiffs Ramona W. Erickson and David E. Erickson purchased from the defendant burial property described as Lot 624A, Block 15, Sunset Memorial Park, according to the plat thereof on file and of record with the Register of Deeds in and for Hennepin County. The property above described was transferred to plaintiffs by warranty deed, executed and delivered on or about August 30, 1955.

On April 18, 1958, defendant sent a letter to plaintiff Ramona W. Erickson stating that it

was impossible for the defendant to permit interment of anyone not of the Caucasian race. The defendant refuses to permit the said plaintiff to use the above described property for her burial because she is an Indian and not a Caucasian.

The purchase of the burial lot herein involved was made by the plaintiffs from the defendant pursuant to a purchase application in writing, first executed by both plaintiffs and subsequently submitted to an officer of the defendant who was authorized to pass upon the acceptance or rejection of the same, and who, relying upon and induced by the representation contained in the said application that both of the plaintiffs were members of the Caucasian race, signed and executed the acceptance appended to the application and caused an executed copy thereof to be delivered to the plaintiffs on or about August 26, 1955.

If the officer of the defendant who executed the acceptance of said purchase application of the plaintiffs had known that Ramona W. Erickson was not a Caucasian, he would have rejected the application and would not have executed the acceptance of the same, and the defendant would not in such case have issued the deed to the property involved herein to the plaintiffs.

[Deed Language Quoted]

The language of the deed particularly applicable here is that "The party of the second part (the Ericksons) covenants and agrees that said property hereby conveyed shall be used only for the interment or burial of deceased persons of the Caucasian race;" The language of the application particularly applicable is that "The undersigned Purchaser(s), who represent(s) himself (herself) (themselves) to be a member or members of the Caucasian race, hereby make(s) application to purchase certain burial space in Sunset Memorial Park * * *

"The Purchaser understands and agrees that no officer, salesman, or other representative of the Association has any authority to make any oral or written statement or agreement not contained in this application, as printed, or to alter or add to the original or duplicate thereof."

Plaintiffs wish to use the lot for the interment of their bodies after death and bring this action to secure adjudication of their right to do so.

The following questions have been argued by counsel and considered by the Court:

1. Does the defendant's answer assert facts which give rise to a material issue for trial and which, therefore, requires denial of plaintiffs' motion for judgment on the pleadings?

2. Are the racial covenants in plaintiffs' deed and the policies of defendant opposed to the public policy of this State as declared by legislative enactments, particularly M.S.A. 507.18 and Chapter 935, Laws of 1957?

3. Does the Fourteenth Amendment to the Constitution of the United States nullify the exclusionary racial restriction in plaintiffs' cemetery deed and prevent defendant from asserting, and this Court from recognizing, its validity as a good defense to plaintiffs' action?

4. Does common law policy, with particular reference to restrictive racial covenants in land contracts, support the position of plaintiffs or defendant?

IS THERE A FACT ISSUE WHICH REQUIRES A TRIAL?

At the outset it must be conceded that a motion for judgment on the pleadings necessarily admits as true, for the purposes of the motion, all well-pleaded facts contained in the adversary's pleading, as well as all well-pleaded facts in the proponent's pleading. See *Dunnell's Minnesota Digest*, Sec. 7693 and cases cited.

In their application to purchase the lot in question, plaintiffs represented themselves to be members of the Caucasian race. Although the application was taken by a representative or agent of defendant who must have been aware that Mrs. Erickson was not of the Caucasian race, it was by its own terms not binding until approved by an officer of defendant, and this officer, in giving his approval, assumed that both Ericksons were Caucasians. The deed was issued by defendant on the basis of this assumption.

In its memorandum defendant states: "At the time plaintiffs signed the purchase application, they were either aware or not aware that it contained a representation on their part that they were both of the Caucasian race." This is accepted as true. It is not disputed by plaintiffs.

Defendant then argues that if the second alternative is true, there was an innocent mistake of fact on the part of both parties and, therefore, defendant has a right to rescind. It is further contended that if the first alternative represents the true facts, plaintiffs have been guilty of fraud, and defendant, as the selling

party, has a right to rescind the transaction and procure its cancellation for unilateral mistake on the seller's part as to a material fact induced by fraud, or its equivalent, on the part of the plaintiffs.

[Right to Rescind or Cancel?]

It seems that the only issue of fact is whether the first or second alternative is true. If existence of neither gives rise to the right of rescission or cancellation, then no material question of fact is presented which requires a trial. That question is now considered.

It is established under our decision law that cancellation or rescission may be granted for a mutual mistake of the parties to a contract as to a material matter of fact concerning the contract. Such relief may also be granted where only one of the parties was mistaken as to a material matter of fact relating to an essential element of the contract, particularly if there has been fraud or similarly inequitable conduct on the part of another party. See *Dunnell's Digest*, Cancellation of Instrument, Sec. 1192 and cases cited.

Similarly, contracts are subject to rescission or cancellation for fraud, and in appropriate cases equity will cancel a deed for fraud. *Dunnell's Digest*, Sec. 1188 and cases cited. An essential of fraud is that the representation must be of an existing material fact. *Dunnell's Digest*, Sec. 3820 and cases cited. In *Rien, Trustee v. Cooper*, 211 Minn. 517, 523, 1 N.W.2d 847, our Supreme Court said:

"A charge of fraud can be based only on a material misrepresentation. Not every representation is material. A representation is not material unless it prejudices the party or is germane to the fraud alleged. Materiality depends on the circumstances."

So here, regardless of which of the alternatives referred to above may be applicable, it would seem there can be no right of rescission or cancellation unless the representation that Mrs. Erickson was of the Caucasian race was a material representation relating to an essential fact in the contract.

Basic to consideration of the problem just posed is the public policy of this State. For reasons to be considered later, it is determined that the restrictive covenant in the deed and defendant's policy upon which that covenant

is based is contrary to our public policy. The question presented, then, is this:

[Representation of Material Fact?]

Was the representation that Mrs. Erickson was of the Caucasian race, whether mistaken or deliberate, a representation of a material fact under the circumstances of this case? If it was, there was either a unilateral mistake as to a material fact, or fraud; defendant should have the right to rescind and judgment for plaintiffs on the pleadings may not be granted. If, however, this representation was not of a material fact, there is no right of cancellation or rescission, and a determination of the merits may be made in the present posture of the case.

Stated differently, if the policy of this State is to prohibit discrimination in the sale of public cemetery lots and interment therein upon the basis of race, was it a misrepresentation of a material fact for Mr. and Mrs. Erickson, as purchasers, to represent that Mrs. Erickson is a Caucasian when in fact she is not?

Statutory public policy prohibits discrimination in public accommodations or places of amusement based upon race, color, religion or national origin. See M.S.A. 327.09. Assume that a person, not a Caucasian, was assigned hotel accommodations upon his representation that he was a Caucasian. In the light of this public policy, could the hotel management rescind the contract, refuse accommodations, and eject such person on the ground that there had been a misrepresentation of a material fact? Our policy, constitutional and statutory, prohibits gambling. Assume that property valuable and presently used for gambling purposes was sold on the basis of a representation that the purchaser would continue to operate a gambling establishment and that such person, after purchase, refused to do so. Could there be a rescission on the ground that the purchaser misrepresented a material fact? The last example may appear extreme but it points up the problem presented. The first is very close to the question presented. Few would argue that either question could be answered in the affirmative. We believe the same result is required here.

[Not Material]

It is concluded, therefore, that the representation that Mrs. Erickson was of the Caucasian

race was not a material fact and that no right of cancellation or rescission exists on the ground of either mistake or fraud. No case has been found which is directly in point on this proposition, but it appears to have adequate support in principle. Otherwise, public policy could be circumvented and evaded by the unilateral action of those who oppose such policy.

In 23 Am. Jur., Fraud and Deceit, Sec. 117, it is stated that "One suffers no damage where he is fraudulently induced to do something which he was under a legal obligation to do." See also 37 C.J.S., Fraud, Page 292. In this State it has been held that fraud cannot be predicated on an act which the law directs or authorizes. Dunnell's Digest, Sec. 3831 and cases cited. Deceit not followed by a wrong is not actionable. Dunnell's Digest, Sec. 3828. Fraud without damage or injury is not remediable. 37 C.J.S., Fraud, Par. 4, Page 288. These principles support the conclusion reached above.

Although the question may not now be directly presented, it is added that if the positions of the parties were reversed and defendant was here suing for cancellation or rescission, it would then be directly confronted not only with statutory public policy, to be considered next, but also state action in conflict with the guarantees of the Fourteenth Amendment to the Constitution of the United States as interpreted in *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, and similar cases.

STATUTORY PUBLIC POLICY.

In *Park Construction Co. v. Independent School Dist.*, 209 Minn. 182, 296 N.W. 182, our Supreme Court said: "Public policy, where the legislature has spoken, is what it has declared that policy to be."

With reference to the problem here considered, the Legislature has spoken and established guide lines which govern decision here. In 1953 it amended Sec. 507.18 of our statutes so that it reads, in part, as follows:

"Subdivision 1. Religious faith, creed, race, color. No written instrument hereafter made, relating to or affecting real estate, shall contain any provision against conveying, mortgaging, encumbering, or leasing any real estate to any person of a specified religious faith, creed, race or color, nor shall any such written instrument contain any provision of any kind or character

discriminating against any class of persons because of their religious faith, creed, race or color. In every such provision any form of expression or description which is commonly understood as designating or describing a religious faith, creed, race or color shall have the same effect as if its ordinary name were used therein.

"Subd. 2. Restriction only is void. Every provision referred to in subdivision 1 shall be void, but the instrument shall have full force in all other respects and shall be construed as if no such provision were contained therein.

"Subd. 3. Words constructively defined. As used in this section the phrase 'written instruments relating to or affecting real estate,' embraces every writing relating to or affecting any right, title, or interest in real estate, and includes, among other things, plats and wills; and the word 'provision' embraces all clauses, stipulations, restrictions, covenants, and conditions of the kind or character referred to in subdivision 1."

In 1957, in enacting Laws 1957, Chapter 953, the Legislature made a declaration of public policy as follows:

"Section 1. Interim commission, discrimination. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, color, creed, religion, national origin or ancestry are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces and undermines the institutions and foundations of a democratic state. The legislature hereby finds and declares that discrimination or segregation in the sale, lease, sublease, use, occupancy, tenure, acquisition or enjoyment of property or housing accommodations because of race, color, creed, religion, national origin or ancestry tends unjustly to condemn large groups of inhabitants to depressed and substandard living conditions which are inimical to the general welfare and contrary to our democratic way of life. The aforementioned practices of discrimination and segregation in the sale, lease, sublease, use, occupancy, tenure, acquisition or enjoyment of property of housing accommodations

because of race, color, creed, religion, national origin or ancestry are declared to be against the public policy of this state."

Sec. 507.18 in its present form was adopted prior to the date the Ericksons made their purchase from defendant. The deed they received is an instrument relating to or affecting real estate as defined by this statute. It contains a provision discriminating against a class of persons (non-Caucasian) because of color. If it is applicable here, the restriction is void under Subd. 2.

[Is Statute Applicable?]

Defendant argues that Sec. 507.18 does not apply. The first reason advanced by defendant is that the statute applies only to restrictions affecting ownership or use of land by living persons. If that is true, the short answer is that both Mr. and Mrs. Erickson are living persons, and the contention of defendant, if sustained, would discriminate against them and affects their ownership or use of an interest in real estate.

Defendant next urges that the right of sepulture or interment is a special property right; that Sec. 507.18 is in the chapter of our statutes dealing with conveyancing, generally, and that the general language of this section should not be held applicable to a conveyance of the special property right involved herein. It is conceded that the nature of the right of a purchaser of a cemetery lot or an interest in a cemetery lot is not made clear by statutory law. This subject will be considered later.

We have looked to the instrument of conveyance actually involved here. It is called a deed. That of itself imports an instrument conveying an interest in real estate. By its language it does "Grant, Bargain, Sell and Convey to the party of the second part, their successors and assigns forever, the sole, exclusive and entire right of Interment or Sepulture in the following described piece or parcel of land situate, lying and being in the County of Hennepin and State of Minnesota, to-wit:

"Block 15 Lot number 624 A consisting of 2 spaces in Sunset Memorial Park, according to the plat of that part of said Sunset Memorial Park in said Hennepin County in which said Lot and Block are situated, which said Plat is filed for record in the office of the Registrar of Deeds for the

County of Hennepin and State of Minnesota.

"Provided, Always, and this Deed is made upon the express conditions * * *."

Chapters 306 and 307 of the General Statutes contain specific provisions relating to cemeteries. With the one possible exception to be noted later, we have found no provision of these chapters inconsistent with Sec. 507.18. Other provisions seem to be consistent with that section and the public policy established by its terms. Scattered throughout our statutes are many provisions relating to conveyances in special situations. Except where there is conflict, there is no reason for believing that the provisions of Chapter 507 are inapplicable in those special situations.

Defendant points to M.S.A. 306.02, which reads, in part as follows:

"Any such cemetery association so affiliated with a religious corporation * * * may also provide for the acquisition of other cemetery properties within the state wherein bodies of persons of the same religious faith, exclusively, are to be buried."

[Statutory Conflict Argued]

It is argued that if Sec. 507.18 is given the construction asked for by plaintiffs, it will necessarily be in conflict with Sec. 306.02 and with constitutional guarantees of freedom of religion. It is first noted that this case does not present such a problem. If such a problem is ever presented, application of well established rules of statutory construction and interpretation should avoid conflict and leave both statutes and both policies fully operative. Without restating them, attention is called to the rules set out in *Dunnell's Digest*, Sections 8939, 8945, 8947, 8957, 8970, 8984, 8983 and 8931. Decision here is not intended to even suggest that religious groups may not continue the practice of limiting interment in cemeteries affiliated with such groups to persons of a designated religious persuasion.

We suggest also that if a public cemetery, operated for profit, may limit interment, as defendant would do, there would have been no need for the express grant of Sec. 306.02 quoted above. The mere fact that the grant was given suggests a legislative recognition that in the absence of the grant the limitation might not be imposed.

Although not discussed by counsel, attention has been given to the provisions of M.S.A. Sections 306.29 and 525.14.

Under Sec. 306.29 it would seem that if Mr. Erickson had been a sole purchaser of the fee to cemetery lots, he would, if his wife predeceased him, have under its provisions a legal right to insist that her remains be interred there. Under Sec. 525.14, if Mr. Erickson had been the sole purchaser and had made no testamentary disposition of the lot, Mrs. Erickson, as his surviving spouse, would have a life estate in the lot with the right to interment. Neither of these statutes makes a distinction based on color. So, to the extent that there is a policy discernable from the specific statutes relating to the conveyance and descent of cemetery lots, that policy is consistent rather than inconsistent with the interpretation of Sec. 507.18 adopted here. This conclusion is reached although defendant may contend that the conveyance in this case is under the last sentence of Sec. 306.29 and that, therefore, neither the prior language of the statute nor the provisions of Sec. 525.14 are applicable. Whatever merit such argument, if made, may have, it does not alter the fact that these statutory provisions do indicate a public policy contrary to defendant's position, and nothing is noted in the last sentence of Sec. 306.29 to indicate inapplicability of that policy to the present situation.

[Statutory Public Policy]

Finally, on the matter of statutory public policy, consideration has been given to Laws 1957, Chapter 953. It is a unique statute. The broad statement of policy it contains does lend support to the contentions of plaintiffs. It is doubtful, however, if its language, standing alone, would adequately support a determination of policy that would fully sustain plaintiffs' position. First, this statute was enacted after the deed in this case was issued. Next, the declaration it contains is so much broader than the title to the act that there is doubt that the declaration could constitutionally be applied to the present situation. Finally, the general declaration is not followed by a substantive legislative determination that could be applied here.

The whole tenor of legislative declarations and determinations, however, lend strong support to the conclusion here reached, that the public policy of this State, as determined by

the Legislature, supports the position of plaintiffs and is contrary to the position taken by defendant.

Consideration has been given to the cases of *Long v. Mountain View Cemetery Ass'n* (Calif.) 278 P.2d 945, and *Rice v. Sioux City Memorial Park Cemetery*, 245 Ia. 147, 60 N.W.2d 110. In both the statutory base for the argument on public policy was a statute similar to our Sec. 327.09 and dissimilar to the statutes upon which decision here is based. They are not considered to be in conflict with this decision.

THE FOURTEENTH AMENDMENT.

Counsel have argued fully the question of applicability to this case of the decision of the United States Supreme Court construing the Fourteenth Amendment to the Federal Constitution in *Shelley v. Kramer*, *supra*, and *Barrow v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, and other cases. It is agreed that under these decisions the prohibitions of the Fourteenth Amendment come into play only if there is state action contravening the equal protection clause of that amendment. Here, if decision is right, there is no state action in contravention of that clause, because state action prohibits, rather than fosters, discrimination. It follows that interesting as the problem presented is, further consideration of the problem is not now warranted.

COMMON LAW PUBLIC POLICY.

The question of common law public policy has also been argued by counsel. As indicated above, where the Legislature has spoken, public policy is what the Legislature has declared it to be. That is as it should be. Here the Legislature has spoken. Because it has, what follows may be gratuitous.

Plaintiff Ramona Erickson is a descendant of those who not so long ago were the proud owners of all our land. Defendant is a corporation operated for profit. It operates a public cemetery. It enjoys the immunity from taxation granted to public cemeteries by our constitution

and our statutes. Their interest in the land involved here was purchased by Mrs. Erickson and her husband and has been paid for by them. It would be a poor policy that would deny to such the right to have their mortal remains lie together in this land in a public cemetery merely because of Mrs. Erickson's descent.

In the words of Justice Dooling of the California District Court of Appeal, in his concurring opinion in *Long v. Mountain View Cemetery Association*, *supra*:

"I concur, but I cannot resist a word of protest. I cannot believe that a man's mortal remains will disintegrate any less peaceably because of the close proximity of the body of a member of another race, and in that inevitable disintegration I am sure that the pigmentation of the skin cannot long endure. It strikes me that the carrying of racial discrimination into the burial grounds is a particularly stupid form of human arrogance and intolerance. If life does not do so, the universal fellowship of death should teach humility. The good people who insist on the racial segregation of what is mortal in man may be shocked to learn when their own lives end that God has reserved no racially exclusive position for them in the hereafter."

[Defendants Not Criticized]

Nothing said herein is intended as criticism of the position defendant has taken in this case. It was stated in argument that the present owners of defendant inherited the policy questioned here. Under all the circumstances defendant has a legal and perhaps also a moral obligation to contest this proceeding. This it has done with ability and vigor. Indeed, the Court is grateful to counsel on both sides for the competent and scholarly presentation they have made. Not all questions raised by counsel are discussed in this memorandum but none, we believe, have been overlooked. Those we have discussed are, in our view, determinative.

PUBLIC ACCOMMODATIONS Restaurants—Delaware

WILMINGTON PARKING AUTHORITY, a body corporate of the State of Delaware, and Eagle Coffee Shoppe, Inc., a corporation of the State of Delaware v. William H. BURTON.

Supreme Court of Delaware, January 11, 1960, 157 A.2d 894.

SUMMARY: A Delaware Negro citizen was refused service because of race by a Wilmington restaurant located in a leased space in a public parking building owned by the Wilmington Parking Authority, a state agency. He brought a class action in a state chancery court asking for a declaratory judgment that such discrimination violates the Fourteenth Amendment, and for injunctive relief. The court held that, as the renting to the restaurant and other tenants constituted a "substantial and integral part of the means to finance a vital public facility," it was incumbent on the Authority to enter into leases that would require the tenant to carry out the Authority's constitutional duty not to deny state citizens equal protection of the laws. The Fourteenth Amendment was held "applicable to the operation of all aspects of the structure here involved," and to forbid discrimination therein. An order was therefore issued granting to plaintiff and his class the relief requested. 150 A.2d 197, 4 Race Rel. L. Rep. 353 (Del. Ch. Ct. 1959). On appeal, the state supreme court reversed. The fundamental problem was said to be whether the state, directly or indirectly, "in reality" created or has maintained the facility at public expense or has controlled its operation; for only if such be the case would the Fourteenth Amendment apply. Finding that the Authority did not locate the restaurant within the building for the convenience and service of the public using the parking facilities and has not directly or indirectly operated nor financially enabled it to operate, the court held that the Authority's only concern in the restaurant—the receipt of rent which defrays part of the operating expense of providing the public with off-street parking—was insufficient to make the discriminatory act that of the state. And the fact that the City of Wilmington had originally "advanced" 15% of the facility's cost (the balance being financed by an Authority bond issue) was held not to make the enterprise one created at public expense, for "slight contributions" are insufficient to cause that result. Finally, it was held that the fact that the lessee sells alcoholic beverages does not make it an inn or tavern, which by common law must not deny service to any one asking for it; rather, it functions primarily as a private restaurant, which by common law and state statute may deny service to anyone offensive to other customers to the injury of its business.

WOLCOTT, Justice

This action seeks a declaratory judgment that Eagle Coffee Shop, Inc. (hereafter Eagle), the lessee of Wilmington Parking Authority (hereafter the Authority) may not operate its restaurant business in the parking structure at Ninth and Shipley Streets, Wilmington, in a racially-discriminatory manner. The action was commenced by the plaintiff, a Negro, who was denied service by Eagle solely because of his race, color and ancestry, which, plaintiff argues, abridged his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

There are no disputed issues of fact. Consequently, all parties below moved for summary judgment. The Vice-Chancellor granted judgment for the plaintiff, holding that the Fourteenth

Amendment is applicable to the operation of all aspects of the parking structure, and that it forbids discriminatory practices in the restaurant of the Authority's lessee. The defendants appeal.

[Plaintiff's Position]

The plaintiff's position is that the Authority is performing a public or state function in operating the public parking facility in question and, as an instrumentality of the state, is required to insure that the operation of the public facility shall not be in a racially-segregated manner. Plaintiff further argues that Eagle, as lessee, is the instrumentality of the Authority, admittedly an agency of the state, and that its discriminatory acts are in law the acts of the state and, hence, violative of the Equal Protection Clause of the

Fourteenth Amendment. The court below so ruled.

The Authority's position is that it has not discriminated racially against the plaintiff because it has no legal or *de facto* control over the operation of Eagle's restaurant. It argues that its sole interest in the Eagle lease is the deriving of rent therefrom in order to defray the expense of operating the parking facility, an otherwise unprofitable operation required, however, to be self-sustaining. Accordingly, the Authority argues that Eagle's refusal to serve the plaintiff was private and not state action subject to the interdict of the Fourteenth Amendment.

Eagle joins in the position taken by the Authority and, in addition, relies on 24 Del.C. § 1501 which provides that no restaurant shall by law be obligated to give service to persons if such service would be offensive to the major part of its customers to the injury of its business. This statute, Eagle argues, is a codification of the common law relating to the duties of restaurant keepers.

Since the decision of the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, the states and their instrumentalities have been required to act within the scope of state action in a racially non-segregated manner. If, therefore, Eagle is, as plaintiff contends, the ultimate instrumentality of the state performing a state function, the Fourteenth Amendment requires it to serve the plaintiff and all others with his racial background.

[The Ultimate Question]

The ultimate question for our determination, therefore, is whether or not, under the decisions cited to us, the Eagle restaurant business is cast with such public character as to make it in law a state function, carried on under the auspices and with the support of the public authority. We turn to the authorities cited to us for the answer.

Nash v. Air Terminal Services, Inc., D. C., 85 F.Supp. 545, was a case decided under the now discarded doctrine of separate but equal facilities for Negroes. The case, however, seems pertinent not only because of its factual resemblance to the case at bar but, also, as an enunciation of a test for determining when certain actions may or may not be attributed to the public government.

In the *Nash* case the plaintiff, a Negro using the facilities of the Washington National Airport

for air transportation, sought and was refused service in a restaurant operated in the terminal building. The restaurant in question was operated on a concession from the public government in a building constructed entirely with public money and operated for the serving of persons using an airport constructed entirely with public money. Under these facts it was held that the plaintiff had been denied his rights since, at the time, there were no separate but equal facilities offered for Negro patrons of the airport. *A fortiori*, if the failure to supply separate but equal facilities at a time when that doctrine was part of our constitutional law was a deprivation of the rights of the plaintiff, once that doctrine is struck down the plaintiff's rights would be denied by the refusal of any service.

[Derrington v. Plummer]

Derrington v. Plummer, 5 Cir., 240 F.2d 922, dealt with the refusal of service to a Negro in a cafeteria installed and operated in the basement of a county courthouse. The facts were that some time in 1953 the county contemplated the erection of a new courthouse. In the plans of the building a portion of the basement was set aside and reserved for a cafeteria to be operated primarily for the benefit of persons having business in the courthouse. The courthouse, including the cafeteria facilities, was completed entirely with public funds. Thereafter, the cafeteria was operated by a private lessee. The cafeteria served persons having business in the courthouse and public employees, and, also, was open to the public. The plaintiff, a Negro, sought service and was refused because of his race.

It was held that the lessee was subject to the prohibitions of the Fourteenth Amendment as the agent of the state. The rationale of the decision is that the courthouse having been built with public funds for the use of the public, the original plans having provided for the inclusion of a cafeteria for the use of the public, and the cafeteria, itself, having been equipped and furnished by the county, the state could not avoid the constitutional requirement of nondiscrimination by leasing to a private business.

Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82, was a case in which the plaintiffs, Negro citizens of Ohio, sought the right to use and enjoy a municipal swimming pool, built at public expense. It appeared that when completed the swimming pool had first been opened on a nondiscriminatory racial basis but that, from

that, trouble and disorder had ensued. The city ceased to operate the swimming pool and leased it to a veterans organization at an annual rental of 10% of the gate receipts; the city, however, paying all maintenance costs. The veterans organization, the lessee, operated the pool in a racially-discriminatory manner.

It was held that the lease to the veterans organization was a subterfuge adopted by the city to avoid the requirements of the Fourteenth Amendment. The court was of the opinion that, under the circumstances, the veterans organization was an instrumentality of the city which, in turn, of course, was an instrumentality of the State of Ohio and, thus, was subject to the provisions of the Fourteenth Amendment.

Substantially to the same effect is the case of *Kern v. City Com'rs of City of Newton*, 151 Kan. 565, 100 P.2d 709, 129 A.L.R. 1156.

[*Muir v. Louisville Park Theatrical Ass'n*]

Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112, was a case in which the City of Louisville had erected in one of its public parks an amphitheater, owned and maintained by the city. It appeared that the amphitheater was an appropriate adjunct of the city's park maintained for all the people. The city leased the structure to a theatrical association which, under the terms of its lease, had the right to charge admission fees and to sell refreshments. The plaintiff, a Negro, was denied admittance to a performance in the amphitheater given by the theatrical association.

The District Court held, and was affirmed on appeal to the Court of Appeals, that the city was guilty of no racial discrimination because there was no evidence that any comparable Negro theatrical association had applied to the city for use of the amphitheater. On petition for certiorari to the Supreme Court of the United States the judgment in the *Muir* case was reversed and the case remanded for consideration in the light of *Brown v. Board of Education*, *supra*.

The reason for the reversal is not set forth in full, but it seems apparent that the Supreme Court had in mind the circumstances that the city had built and maintained from public funds an amphitheater for public use and, under the circumstances, any lessee operated it as an instrumentality of the city.

Commonwealth of Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792; 353 U.S. 989, 77 S.Ct. 1281,

1 L.Ed. 2d 1146, was a *per curiam* opinion holding that the trustees under the will of Stephen Girard, appointed by the City of Philadelphia, could not perform their duties under the trust created for the education of "white male orphans" in a manner to discriminate against Negro male orphans. Plaintiff points out that Stephen Girard, by his will, had created a trust out of his private fortune but that, nevertheless, the principles of the Fourteenth Amendment were held to apply to the operation of the trust by the trustees. The element of public control, apparently, was that the trustees of the Girard Trust were publicly appointed trustees in complete control of the operation of a privately endowed trust.

[*Conclusion from Cited Authorities*]

We think a careful consideration of the foregoing cited authorities leads necessarily to the conclusion that the provisions of the Fourteenth Amendment relating to equal protection of the laws apply to the operation of any facility or any other thing created at public expense or operated by public authority.

In the *Nash* case, for example, the air terminal at the Washington National Airport had been erected solely with public funds and the restaurant involved had been contemplated initially as a service to persons using the National Airport. Furthermore, it is not clear that the public government did not exercise ultimate control over operation of the restaurant since it was operated as a concession of the public government.

Similarly, the *Derrington* case involved a facility constructed entirely with public funds which contained, from the planning stage onward, a cafeteria intended for the use of the public. The cafeteria, itself, was constructed and equipped by public money and was operated primarily for the benefit of the persons using the courthouse. Consequently, while technically there may have been no direct control over the lessee who operated the cafeteria, the lessee was nevertheless operating a facility erected entirely by the public treasury for the purpose of serving the public.

The *Culver* and *Kern* cases were cases also of publicly paid for facilities. These cases also contain the additional circumstance of an attempt by subterfuge to avoid the prohibitions of the Fourteenth Amendment. The *Muir* case similarly is a case of the erection and maintenance entirely with public funds of an appropriate adjunct of a public park.

[Girard College Case]

The Girard College case, *infra*, apparently falls within the scope of the Fourteenth Amendment solely by reason of the fact that the trustees administering the trust created by Stephen Girard were publicly appointed. It is interesting to note that since the *per curiam* decision of the Supreme Court of the United States, the State of Pennsylvania has abrogated the right of the City of Philadelphia to appoint the trustees administering the Girard Trust, thus, presumably, eliminating the requirement that such trust be administered in a racially non-discriminatory manner. Cf. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, certiorari denied 357 U.S. 570, 78 S.Ct. 1383, 2 L.Ed.2d 1546.

It thus seems apparent to us from the cited authorities that the Fourteenth Amendment is applicable to the operation of a facility, either public or quasi-public in nature, if either the facility has been erected and is maintained with public money, or if the operation of such a facility is conducted under public auspices or control.

We turn now to the particular facts of the case at bar. Initially, we should observe that the plaintiff in the case at bar has not been discriminated against by the Authority in the operation of the public parking portion of the facility since the record discloses that at the time this incident occurred the plaintiff had parked his car in the public parking portion and, thereafter proceeded to the Eagle restaurant where he was denied service.

[The Surrounding Facts]

The facts surrounding this controversy and the physical aspect of the Authority's facility do not appear in much detail in the record before us. However, we think we are at liberty to take notice of certain physical facts concerning the matter which appear from a casual inspection of the facility, itself. We note, therefore, that the space in the Authority's structure leased by Eagle, while located within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper. The main and marked public entrance to Eagle's restaurant is located on Ninth Street. It appears from the record before us, furthermore, that Eagle at its own expense installed the major portion of the furnishings of its restaurant and all of the necessary fixtures to make the leased space suitable for

the operation of its business. The Authority installed a bare minimum in the space ultimately leased to Eagle.

The lease between the Authority and Eagle contains a covenant binding Eagle to "occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." Plaintiff refers to this covenant but we think the covenant does not have much bearing on the basic question presented to us. We have for decision the broad question of whether or not the maintenance of the facility by the Authority, admittedly a state instrumentality, is in all its ramifications and details, including the leasing to private business, state action falling within the scope of the protective provisions of the Fourteenth Amendment. The referred to covenant is applicable to this case only if the answer to the broad question is in the affirmative since only under such circumstances would the Fourteenth Amendment be applicable to Eagle's business.

[Enterprise's Nature Important]

The question is to be decided in the light of the circumstances surrounding this entire matter. The nature of the enterprise conducted by the Authority is of primary importance to our decision. Unfortunately, the record before us is not as complete as we would have desired. We think, however, that we may take notice of the facts embodied in the opinion in *Wilmington Parking Authority v. Ranken*, 34 Del.Ch. 439, 105 A.2d 614, on which plaintiff relies. In that case we upheld against attack the constitutionality of the Parking Authority Act of 1951 (22 Del.C. Ch. 5) and the legality of the proposed acts of the Authority pursuant to it.

In the *Ranken* case we had before us certain determinations made by the Authority in planning the erection of the facility in question. Thus, the Authority determined that in order to erect and operate the structure as a self-sustaining unit as required by the General Assembly, it would be necessary to obtain additional revenue from commercial leasing of space, and to utilize the space of the final structure upon the following ratio: 61% for parking; 39% for private leases. We assume that the structure as actually completed maintains this ratio. The Authority made a further determination that the cost of construction, including the cost of land, would be divided upon the following ratio:

38.4% to parking space; 61.6% to the leased area. We assume that this estimate of division of cost is the fact. Finally, the Authority determined that its revenue derived from the operation of the facility would come from these sources upon the following ratio: 30.5% from parking; 69.5% from private leases. We assume this division to be the fact.

From the Ranken case it appears that the only public money used in the construction of the facility was the sum of \$934,000 "advanced" by the City of Wilmington and used in the purchase of a portion of the land required. It did not appear in the Ranken case, and does not appear in the case now before us, what the terms and conditions of this "advance" by the city were.

[Cost of the Facility]

We have not been furnished with the actual cost figures of the construction of the facility but since, in the Ranken case, the cost of construction of a parking facility alone was estimated to be approximately \$3,800,000, and since the estimated cost allocated to parking space of a combined facility was 38.4%, we assume that the total cost of the presently existing facility was in the neighborhood of \$6,100,000. It does appear as a fact, however, that the actual cost of construction was paid from the proceeds of the sale of revenue bonds issued by the Authority and, accordingly, upon the determined ratios, the public money "advanced" for the project amounts to approximately 15% of the total cost of the facility as finally erected.

From the Ranken case, also, it appears that the revenue from parking alone was predicted to be \$150,000 annually which was estimated to amount to 30.5% of the total expected revenue of the combined facility. Accordingly, the facility's total revenue we assume to be approximately \$342,000 annually, of which approximately \$212,000 is derived from the rentals to commercial enterprises.

In the Ranken case we considered a constitutional attack upon the Authority's proposal on the basis that it had no authority to enter into private leases solely for the purpose of obtaining revenue to support the operation of the public part of the facility, viz., the furnishing of off-street parking. We held, however, that the authority to lease to private business was valid. We held that the furnishing of off-street parking was a proper public purpose and met an existing

need supported by a legislative finding to that effect and, since it was the fact that the proper public purpose could not be supplied as a self-supporting unit without additional revenue to be supplied by commercial leases, we held that the entering into such private leases did not destroy the public-use character of the facility.

[Leases Unrelated to Public Purpose]

We recognized in the Ranken case that the proposed leases to private businesses were wholly unrelated to the public purpose to be subserved by the parking facility, except as a source of additional revenue to permit the financing and operation of the parking facility. We were of the opinion that the supplying of off-street parking services occupying 61% of the total space of the structure, despite the leasing of the balance of the space to private business, was and remained the paramount or primary use of the structure. We held, therefore, that the leasing to private business, while necessary financially to the project, was nevertheless a subordinate or incidental use of public property. We, accordingly, upheld the constitutionality of the grant of power to lease which, in the absence of such circumstances, would have been an unconstitutional use of public property.

We summed up our holding in the Ranken case in the following language [34 Del. Ch. 439, 105 A.2d 627]:

"Since the dominant or underlying purpose of the contemplated project subserves a public use, commercial leasing of space therein for uses unrelated to the public use is permitted to the extent, and only to the extent, that such leasing is necessary and feasible to enable the Authority to finance the project."

We think it apparent, therefore, that the only connection Eagle has with the public facility operated by the Authority is the furnishing of the sum of \$28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise.

[Cases Distinguished]

We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff,

that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.

It is further clear from this record, and from the Ranken case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial leases entered into by the Authority were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public "advance" of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a matter. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. *Eaton v. Board of Managers*, D.C., 164 F.Supp. 191.

[Decisive Considerations]

Fundamentally, the problem is to be resolved by considerations of whether or not the public

government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; if it is not the case, the operators of the enterprise are free to discriminate as they will. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 842, 91 L.Ed. 1161. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

[A Purely Private Business]

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to every one. This is the common law, and the law of Delaware as restated in 24 Del.C. § 1501 with respect to restaurant keepers. 10 Am.Jur., Civil Rights, §§ 21, 22; 52 Am.Jur., Theatres, § 9; *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F.2d 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall with-

in the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 Del.C. § 1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that, at common law, an inn or tavern could deny services to no one asking for

it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 Del.C. § 1501, which does not compel the operator of a restaurant to give service to all persons seeking such.

For the foregoing reasons, the judgment of the court below is reversed.

PUBLIC ACCOMMODATIONS

Restaurants—Illinois

Charles H. WILLIAMS, J. L. Ware, M. Kinsey, Rosalie Wilson, and Leona Brown v. Melvin Shad OWEN, d/b/a "Four Way Cafe—Gertrude's Home Cooking," Glen Hutchinson, d/b/a "Glen's Restaurant," Robert White and Eva White, d/b/a "Bob White Cafe."

United States District Court, Eastern District, Illinois, December 18, 1959, 179 F.Supp. 268.

SUMMARY: Certain residents of states other than Illinois brought a federal court action based on diversity of citizenship jurisdiction against Illinois residents, owners of establishments serving food to the public in that state. Three counts alleged that defendants had violated a state statute forbidding denial to any citizen, because of race or color, full enjoyment of enumerated accommodations; the court granted defendants' motion to dismiss these counts because the statute expressly limited liability thereunder to \$500, and therefore a \$3000 controversy necessary for federal jurisdiction was not provided. Three other counts alleged that defendants were innkeepers who had failed to fulfill their common law duties to provide service regardless of race or color. Defendants moved to dismiss these counts for failure to state a cause of action, on the ground that defendants are not innkeepers but are restaurant owners, against whom the common law provides no civil rights remedy for refusal to serve persons because of race or color. This motion was denied because these counts alleged defendants to be innkeepers, and as such they would be subject to common law liability to provide racially non-discriminatory service. However, upon findings that plaintiffs had wilfully failed to answer interrogatories or to respond to defendants' requests for admissions of fact or to enter any objections thereto, the court granted defendants' motion to dismiss the action and entered a default judgment for defendants.

JUERGENS, District Judge.

This cause is before the Court on the defendants' motion to dismiss the complaint. They allege that Counts I, III and V of the complaint are based on the provisions of Section 125, Chapter 38, Illinois Revised Statutes, and under the provisions of said statute liability is limited to \$500, and that in Counts II, IV and VI the plaintiffs assert a common law action for which there is no foundation under Illinois law.

The defendants have also filed a motion to dismiss and for default judgment. The latter motion is bottomed on the failure of the plain-

tiffs to answer interrogatories and request for admissions of fact propounded to them by the defendants.

Jurisdiction is founded on diversity of citizenship. The plaintiffs are citizens and residents of states other than the State of Illinois, and the defendants are residents of the State of Illinois. The amount in controversy is alleged to exceed the sum of \$3,000, exclusive of interest and cost. The cause was filed on June 17, 1958.

The motion to dismiss for failure to show jurisdiction in this Court as to Counts I, III and V and for failure to state a cause of action in Counts II, IV and VI will be considered first.

[Statutory Violation Alleged]

In Counts I, III and V of the complaint the plaintiffs assert that the defendants named in each of the counts violated Section 126, Chapter 38, Illinois Revised Statutes, and are accordingly liable to the plaintiffs as provided therein. Section 126, Chapter 38, provides as follows:

"That any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense, forfeit and pay a sum not less than twenty-five (\$25) dollars nor more than five hundred (\$500) dollars to the person aggrieved thereby, * * *"

The statute above set out clearly limits the liability for a violation thereof and specifically provides that such limitation shall be \$500. Thus, it is clear that the amount in controversy in Counts I, III and V is insufficient to provide jurisdiction in this Court. Accordingly, Counts I, III and V must be dismissed for lack of jurisdiction.

[Status As Innkeepers Alleged]

The defendants assert that there is no common law civil rights remedy for refusal of a restaurant owner to render service to anyone on account of race, color or creed; that the defendants were in truth and in fact restaurant owners and not innkeepers and, accordingly, were not subject to the common law duties and responsibilities of innkeepers.

The Court has examined the law of the State of Illinois concerning liability of a restaurant owner for refusing to render service to anyone on account of race, color or creed and finds that there is no provision in the common law which requires that a restaurant owner render service to anyone on account of race, color or creed. However, the complaint alleges that the defendants were innkeepers and as such would be subject to common law liability to provide services regardless of race, color or creed. Since the complaint alleges that the defendants were innkeepers and since there is no evidence before this Court to show the contrary, a motion to dismiss

on the grounds that Counts II, IV and VI fail to state a cause of action must be denied.

Next to be considered is the defendants' motion to dismiss and for default judgment for failure of the plaintiffs to answer interrogatories propounded to them pursuant to Rule 33 of the Federal Rules of Civil Procedure, Title 28 U.S.C.A. and requests for admissions of fact pursuant to Rule 36 of the Federal Rules of Civil Procedure, Title 28 U.S.C.A.

[Plaintiffs Failed to Respond]

The plaintiffs have failed to file a response, either by way of answer or objection, to the various interrogatories and requests for admissions of fact as requested by the defendants. The interrogatories were propounded to the plaintiffs by the defendants by mailing same to the attorneys for the plaintiffs on the 22nd day of April, 1959. Thereafter, the defendants filed their motion to dismiss, which motion was set for hearing on June 1, 1959. This hearing was postponed at the request of the plaintiffs. On June 29, 1959, the defendants served upon counsel for plaintiffs an additional set of interrogatories and a set of requests for admissions. On motion of the plaintiffs the Court on July 16, 1959, granted the plaintiffs an extension of time up to and including September 11, 1959, in which to file objections or answers to the interrogatories and requests for admissions of fact. Notwithstanding the extension of time, the plaintiffs have failed to reply to the requests for admissions and the interrogatories or to present any objections thereto.

On November 13, 1959, the Court set down this cause for oral hearing on all pending motions, which included both motions here under consideration. Notice of the hearing was given to all parties. Notwithstanding the notice of the hearing, the plaintiffs' local attorney appeared and stated that counsel for the plaintiffs had asked that he again obtain a continuance from the Court. No reason for failure to appear or failure to answer or otherwise reply to the interrogatories or the requests for admissions of fact was presented.

Rule 37 of the Federal Rules of Civil Procedure provides in pertinent parts as follows:

"Rule 37. Refusal to Make Discovery:
Consequences.

"(d) Failure of Party to Attend or Serve Answers. If a party or an officer or manag-

ing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party. * * *

[Dismissal Proper]

In accordance with Rule 37 the courts have held that dismissal of an action and the entry of default judgment is proper where there has been a wilful violation of the letter and spirit of the Federal Rules of Civil Procedure pertain-

ing to discovery procedures. Dismissal of the action and entry of default judgment against the party failing to respond should be ordered by the court where there is wilful failure of the opposing party to answer interrogatories or to respond to the request for admissions of fact. *Milewski v. Schneider Transportation Company*, 6 Cir., 238 F.2d 397.

The Court finds that plaintiffs in this case wilfully failed to answer the interrogatories or to respond to the defendants' requests for admissions of fact or to enter any objections thereto within the period of time prescribed by statute and within the further time granted by the court. Accordingly the Court finds that the plaintiffs' failure to answer was wilful and that this Court should dismiss the action and enter default judgment in favor of the defendants.

PUBLIC ACCOMMODATIONS Restaurants—Maryland

Sara SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC.

United States District Court, District of Maryland, February 16, 1960, 181 F.Supp. 124.

SUMMARY: A Negress, who because of race had been refused food service by a Baltimore, Maryland, restaurant (one of an interstate chain owned by a Delaware corporation), brought a class action in federal court for declaratory and injunctive relief against the corporate owner, claiming that her rights under the Constitution and laws of the United States had been thereby denied. Plaintiff's contention that racial segregation in restaurants is required by certain 1937 and 1942 Maryland decisions was rejected, the court finding that the state courts no longer regard them as law, and that such segregation today is not required by any state statute or decisional law, but is the result of individual proprietors' business choice. The court also rejected plaintiff's argument that defendant, as a licensee of the state to operate a public restaurant, had no right to exclude plaintiff from service on a racial basis; rather, the restaurant's common law right to select its clientele (even on a color basis) was held not to have been changed, despite the state attorney general's opinion that a "restaurant" under the licensing statute is "a place where food is served . . . to all comers . . .", that opinion having been given merely to distinguish the statute's application to restaurants and boarding houses respectively. The court noted also that the state legislature and city council had repeatedly defeated bills requiring restaurant owners to serve all comers regardless of race. Plaintiff's further contention that the state's admission of this foreign corporation and issuance of a restaurant license to it "invests the corporation with a public interest" sufficient to make its racially exclusive action the equivalent of state action was likewise rejected, the court holding that a foreign corporation has the same rights as domestic business corporations, and that the applicable state license laws are not regulatory. And statements in white primary cases,

that when individuals or groups "move beyond matters of merely private concern" and "act in matters of high public interest" they become "representatives of the State" subject to Fourteenth Amendment restraints, were held inapposite to this type situation where defendant had not exercised any powers similar to those of a state or city. Judgment was entered dismissing the complaint.

THOMSEN, Chief Judge.

Plaintiff brings this suit against Atlantic White Tower System, Inc., on her own behalf and on behalf of all others similarly situated, complaining that she was wrongfully refused service in its restaurant at Pulaski Highway (U.S. 40) and Highland Avenue, in Baltimore City, on June 8, 1957, because she is a Negro. She prays a declaratory judgment that the denial of such service violates her rights secured by the Constitution and laws of the United States, an injunction restraining such discrimination at any eating establishment under defendant's ownership, management or control, and other and further relief.

FACTS

The parties filed the following agreed statement of facts:

"Plaintiff, a Negro, is a resident of New York City, New York.

"Defendant is a Delaware Corporation operating and maintaining restaurants in the City of Baltimore, Maryland, and in cities of the State of Pennsylvania and in the District of Columbia.

"Plaintiff is a newspaper reporter by occupation and is employed by a newspaper having national circulation.

On June 8, 1957, Plaintiff was returning from Washington, D.C. to New York City by automobile after have (sic) completed a reporting assignment in Washington, D.C. At about 9:25 in the morning of said date, Plaintiff entered a public eating establishment owned and operated by Defendant located in the City of Baltimore, State of Maryland, on U.S. Highway 40, near Highland Avenue. The Defendant's premises * * * consist of a building, housing the eating establishment, and a parking area on which there was located a sign reading 'PARKING—Only While Eating in White Tower—Trespassers will be Prosecuted.' * * *

"Plaintiff entered the White Tower and ordered two (2) large hamburgers to go. Then a few minutes later, Plaintiff ordered

apple pie and coffee. The counter girl started to fix the pie to be taken out and plaintiff told her that she wanted to eat it in the restaurant. Following the custom of the area the counter girl refused to serve the food to Plaintiff for consumption on the premises because Plaintiff was a member of the Negro race. At that time, there were vacant seats and accommodation for the use and service of patrons.

"Defendant has restaurants only in the State of Maryland and Pennsylvania and in the District of Columbia. It owns no commissary in any of these areas. Purchases or transportation or delivery across state lines, made by or to said Restaurants, if any, are not substantial."

The court will take judicial notice of the Annual Reports of the Commission on Interracial Problems and Relations¹ to the Governor and General Assembly of Maryland. Those reports show that in June 1957 it was not the uniform "custom of the area" to refuse to serve both Negroes and whites in the same restaurant, as indicated by the agreed statement of facts.

The Report dated January 1958 states that in 1957 Negroes were excluded or segregated in 75% of the restaurants in Baltimore, but accepted (unqualified) in 25%. The list of establishments accepting both races included the Howard Johnson's Restaurant on Route 40 in Baltimore City, a short distance from defendant's restaurant, hotel dining rooms, stores with counter service, and eating places of all types,

1. The Commission was created by ch. 548, Acts of 1951, set out in the January 1956 Annual Report, p. 9. That Report and those for subsequent years have been filed as exhibits in this case. They show that considerable progress has been made in reducing discrimination in various areas by means of education, negotiation and persuasion, without sacrificing good will between the races and without producing such violent incidents as have occurred in some large cities where the ratio of Negroes to whites is much lower than in Baltimore. In Baltimore during the past ten years voluntary action has produced the following changes, inter alia: opening of all first-run movie theatres to Negroes; adoption of nondiscriminatory food service and room policies in all major hotels, with one exception; end of white-only service in nearly all department store activities, at many downtown and drugstore lunch counters and at a slowly increasing number of restaurants.

in all sections of the city, many located on important through routes. A similar list was published for areas in Montgomery County, adjacent to the District of Columbia.

DISCUSSIONS

Plaintiff seeks to avoid the authority of *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F.2d 845, by raising a number of points not discussed therein, and by arguing that in Maryland segregation of the races in restaurants is required by the State's decisional law and policy, whereas, she argues, that was not true in Virginia, where the *Williams* case arose. She also contends that the *Williams* case was improperly decided and should not be followed by this court.

THE STATE'S POLICY AND DECISIONS ON SEGREGATION

As a basis for her contention that the alleged custom, practice and usage of segregating the races in restaurants in Maryland is in obedience to the decisional law of Maryland, she cites *Williams v. Zimmerman*, 1937, 172 Md. 563, a school case, where the Court of Appeals said "Separation of the races is normal treatment in this State", and *Durkee v. Murphy*, 1942, 181 Md. 259, a public park case. In the latter case the court said: "There can be no question that, unreasonable as such antipathies may be, they are prominent sources of conflict, and are always to be reckoned with. Many statutory provisions recognize this need, and the fact needs no illustration. 'Separation of the races is normal treatment in this State.' . . . No additional ordinance was required to authorize the Board to apply this normal treatment; the authority would be an implied incident of power expressly given." See also *Boyer v. Garrett*, 1949, D.Md., 88 F. Supp. 353, aff'd, 4 Cir., 183 F.2d 582.

Much water has gone under the bridge since those cases were decided. By ch. 22 of the Acts of 1951, Maryland repealed its Jim Crow laws, Ann. Code, 1939 ed., Art. 27, secs. 510 to 526.² At the same session the Commission on Interracial Problems and Relations was created. A month after the first opinion in *Brown v. Board*

of Education, 1954, 347 U.S. 483, the Board of School Commissioners of Baltimore City abolished segregation in the Baltimore public schools. Shortly after the second *Brown* opinion, 1955, 349 U.S. 294, the Attorney General of Maryland advised the State Superintendent of Schools that all constitutional and legislative acts of Maryland requiring segregation in Maryland public schools are unconstitutional and must be treated as nullities. The Attorney General referred to "the legal compulsion presently existing on the appropriate school authorities of the State of Maryland to make . . . a prompt and reasonable start toward the ultimate elimination of racial discrimination in public education." Varying progress has been made in the several counties. See e.g. *Moore v. Board of Education of Harford County, D.Md.*, 152 F.Supp. 114, aff'd 4 Cir., 252 F.2d 291, cert. den. 357 U.S. 906; *Groves v. Board of Education of St. Mary's County, D.Md.*, 164 F. Supp. 621, aff'd 4 Cir., 261 F.2d 527; Annual Reports of the Commission, January 1958, p. 21, January 1960, p. 20.

In *Dawson v. Mayor and City Council of Baltimore*, 4 Cir., 220 F.2d 386, aff'd 350 U.S. 877, segregation in public parks and bathing beaches was held unconstitutional. The City and the State promptly desegregated all park facilities which had not already been desegregated. So far as this court is aware, no State or City facilities of any kind are now segregated, except certain places of Reformation and Punishment, Ann. Code, 1957 ed., Art. 27, secs. 646 to 726. And the January 1956 Annual Report of the Commission, p. 12, notes that fifteen colored girls had been transferred from Crownsville State Hospital to Rosewood Training School, theretofore an all white institution.

The Court of Appeals of Maryland has not specifically overruled *Williams v. Zimmerman* or *Durkee v. Murphy*, but they are not regarded as law by the Maryland courts or by anyone else in the State. See *Heintz v. Board of Education of Howard County*, 1957, 213 Md. 340; *Burr v. Sondheim*, 1954, Sup. Ct. of Baltimore City, Race Rel. L. Rep., Vol. 1, No. 2, p. 309.

Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers.

2. The Virginia statutes requiring segregation of the races in facilities furnished by carriers and by persons engaged in the operation of places of public assemblage were still on the books when *Williams v. Howard Johnson's Restaurant* arose. See 268 F.2d at 847, note 2.

COMMON LAW AND STATUTORY DUTIES OF A RESTAURANT OWNER IN MARYLAND

Plaintiff's next argument is that defendant, as a licensee of the State of Maryland operating a public restaurant or eating facility, had no right to exclude plaintiff from its services on a racial basis. She rests her argument on the common law, and on the Maryland license laws.

In the absence of statute, the rule is well established that an operator of a restaurant has the right to select the clientele he will serve, and to make such selection based on color, if he so desires. He is not an innkeeper charged with a duty to serve everyone who applies. *Williams v. Howard Johnson's Restaurant*, 268 F.2d at 847; *Alpaugh v. Wolverton*, 184 Va. 943; *State v. Clyburn*, 101 S.Ed.2d 295; and authorities cited in those cases. There is no restaurant case in Maryland, but the rule is supported by statements of the Court of Appeals of Maryland in *Greenfield v. Maryland Jockey Club*, 190 Md. 96, 102, and in *Good Citizens Community Protective Association v. Board of Liquor License Commissioners*, 217 Md. 129, 131.³

Art. 56, secs. 151, et seq., of the Ann. Code of Md., 1939 ed. (163 et seq. of the 1957 ed.), deals with licenses required of persons engaging in all sorts of businesses. Sec. 166 (now 178) provides: "Each person, firm or corporation, resident or non-resident, operating or conducting a restaurant or eating place, shall, before doing so, take out a license therefor, and pay an annual license fee of Ten Dollars (\$10.00) for each place of business so operated except that in incorporated towns and cities of 8,000 inhabitants

or over, the fee for each place of business so operated shall be Twenty-Five Dollars (\$25.00)." The Attorney General of Maryland has said that "A restaurant is generally understood to be a place where food is served at a fixed price to all comers, usually at all times." This statement was made in an opinion distinguishing a restaurant from a boarding house for licensing purposes. 5 Op. Atty. Gen. 303. It was not intended to express opinion contrary to the common law right of a restaurant owner to choose his customers. The Maryland Legislature and the Baltimore City Council have repeatedly refused to adopt bills requiring restaurant owners and others to serve all comers regardless of race; several such bills are now pending. See Annual Report of Commission, January 1960, p. 29.

INTERSTATE COMMERCE

Plaintiff contends that defendant is engaged in interstate commerce, that its restaurant is an instrumentality or facility of interstate commerce and thus subject to the constitutional limitations imposed by the Commerce Clause (Const. Art. 1, sec. 8); and that defendant's refusal to serve plaintiff, a traveler in interstate commerce, constituted an undue burden on that commerce.

A similar contention was rejected in *Williams v. Howard Johnson's Restaurant*, 268 F.2d at 848. It would be presumptuous for me to enlarge on Judge Soper's opinion on this point.

STATE ACTION

"The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13. Plaintiff seeks to avoid this limitation by arguing that the admission by the state of a foreign corporation and the issuance to it of a license to operate a restaurant "invests the corporation with a public interest" sufficient to make its action in excluding patrons on a racial basis the equivalent of state action.

The fact that defendant is a Delaware corporation is immaterial. Once admitted to do business in the State of Maryland, it has the same rights and duties as domestic corporations engaged in the same business. This factor does not distinguish the case from *Williams v. Howard*

3. In *DeAngelis v. Board of Liquor License Commissioners for Baltimore City*, in the Baltimore City Court, reported in the Daily Record of July 26, 1955, a rule of the City Liquor Board which required a licensee to apply to the Board for permission to change over from white to colored trade, and vice-versa, was held to be unconstitutional, as applied to a license holder. Judge Manley said: "• • • the effect of the decision is that the petitioner has the right to determine for himself whether he desires to sell exclusively to colored patrons, exclusively to white patrons, or to a mixed patronage of white and colored."

"The decision should not be construed as conferring any right on white persons to be served in taverns where the licensee limits his customers to colored trade. Nor does it confer any right on colored people to be served in taverns where the licensee limits his customers to white trade. • • •"

This language was quoted by the Maryland Court of Appeals in *Good Citizens Community Protective Association v. Board of Liquor License Commissioners*, 217 Md. 129, 131.

Johnson's Restaurant, where the state action question was discussed at p. 847.

The license laws of the State of Maryland applicable to restaurants are not regulatory. See *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 381, 382. The City ordinance, No. 1145, November 27, 1957, adding sec. 60½ to Art. 12 of the Baltimore City Code, 1950 ed., which was not offered in evidence or relied on by plaintiff, is obviously designed to protect the health of the community. Neither the statute nor the ordinance authorizes State or City officials to control the management of the business of a restaurant or to dictate what persons shall be served.

Even in the case of licensees, such as race tracks and taverns, where the business is regulated by the state, the licensee does not become a state agency, subject to the provisions of the Fourteenth Amendment. *Madden v. Queen's County Jockey Club*, 296 N.Y. 243, 72 N.E.2d 697, cert. den. 332 U.S. 761, cited with approval in *Greenfield v. Maryland Jockey Club*, 190 Md. at 102; *Good Citizens Community Protective Association v. Board of Liquor License Commissioners*, 217 Md. 129. No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency. Plaintiff cites *Valle v. Stengel*, 3 Cir., 176 F.2d 697. In that case a

sheriff's eviction of a Negro from a private amusement park was a denial of equal protection of the laws because under the New Jersey antidiscrimination law the Negro had a legal right to use the park facilities.

Plaintiff cites such cases as *Nixon v. Condon*, 286 U.S. 73, and *Smith v. Allwright*, 321 U.S. 649, for the proposition that when individuals or groups "move beyond matters of merely private concern" and "act in matters of high public interest" they become "representatives of the State" subject to the restraints of the Fourteenth Amendment. The distinction between holding a primary election and operating a restaurant is obvious, and has always been recognized by the courts. Defendant has not exercised powers similar to those of a state or city.

In *Kerr v. Enoch Pratt Free Library of Baltimore City*, 4 Cir., 149 F.2d 212, also relied on by plaintiff, "the Library was completely owned and largely supported . . . by the City; . . . in practical effect its operations were subject to the City's control", as the Fourth Circuit pointed out in distinguishing the Library case from *Eaton v. Board of Managers of the James Walker Memorial Hospital*, 4 Cir., 261 F.2d 521, 527.

The argument that state inaction in the face of uniform discriminatory customs and practices in operating restaurants amounts to state action was rejected in *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F.2d 845. Moreover, as we have seen, the factual premise for the argument is not sound in the instant case.

The clerk will enter judgment in favor of the defendant, dismissing the complaint.

PUBLIC ACCOMMODATIONS

Restaurants—New Jersey

Melvin S. EVANS and John R. Norwood v. Burt J. ROSS, Trading as Holly House.

Supreme Court of New Jersey, December 14, 1959, 157 A.2d 362.

SUMMARY: On complaint of a Negro group, the New Jersey Department of Education, Division Against Discrimination, found a restaurant proprietor guilty of racial discrimination in refusing to reserve a dining room for the use of the Negroes; and the Camden County Court affirmed. 150 A.2d 512, 4 Race Rel. L. Rep. 355 (1959). On further appeal, the Superior Court, Appellate Division, also affirmed. The court ruled that although the Law Against Discrimination as originally enacted granted the Division Against Discrimination power only "to prevent and eliminate discrimination in employment . . . and to take other actions against

discrimination . . .", subsequent amendments had broadened the scope of authority to include action against persons discriminating in the use of public accommodations. It was also held that the "private" dining rooms in question here were public accommodations within the Act, and that the availability of criminal penalties did not preclude action under the "remedial" statute in question. Subsequently, the Supreme Court of New Jersey, without opinion, denied petition for certification to the Superior Court, Appellate Division.

REAL PROPERTY Condemnation—Missouri

STATE of Missouri ex rel. CITY OF CREVE COEUR, a Municipal Corporation; The Mayor, City Attorneys, Building Commissioner and the Board of Aldermen v. Hon. Noah WEINSTEIN, Judge of the Circuit Court, St. Louis County.

St. Louis Court of Appeals, Missouri, December 3, 1959; Motion for Rehearing or to Transfer to Supreme Court denied December 29, 1959, 329 S.W.2d 399.

SUMMARY: The city of Creve Coeur, Missouri, filed an action in a state circuit court to condemn for playground and park purposes land tracts within the city owned by three defendant couples. One couple, Negroes, filed a separate answer and a separate counterclaim and cross-claim, naming as "third party defendants" certain city officials, in which it was prayed that the city and its officials be enjoined from withholding a plumbing permit for one of the tracts, from proceeding with the condemnation suit, and from interfering with and conspiring against the couple to deprive them of constitutional and civil rights to residential housing in the city. Motions by the city to strike allegations from, and to dismiss, the counterclaim and cross-action were overruled by the trial court. The city and its officials, as relators in an original proceeding for prohibition in a state court of appeals, prayed that the respondent circuit judge be prohibited from hearing and considering the allegations and evidence thereon in the cross-claim and counterclaim. A preliminary writ of prohibition was issued and was subsequently made permanent because the allegations presented an issue over which the trial court lacked jurisdiction. The allegations that the city and its officials had in conspiracy acted hastily in choosing a site for alleged park condemnation purposes in disregard of the unsuitable topography, location, and cost thereof upon the sole motivation of racial prejudice to prevent occupancy of private residential housing in the city by Negroes in violation of their rights under the due process, equal protection, and privileges and immunities provisions of the state and federal constitutions were held to present issues beyond the scope of judicial inquiry. The court cited binding precedents to the effect that "once it is established that the use for which private property is appropriated is public, the judicial authority of the court is exhausted," and that courts in such cases are "powerless" to pass upon the motives of, or the reasons actuating, the legislative body in passing a statute or ordinance to that end.

RUDDY, Judge.

The case before us is an original proceeding wherein relators in their petition for prohibition pray for an order and writ of this court prohibiting respondent, Hon. Noah Weinstein, a Judge of the Circuit Court of St. Louis County, from hearing and considering the allegations and the evidence thereon of the cross-claim and counterclaim filed in a condemnation action.

The counterclaim and cross-claim was filed by defendants, Howard P. Venable and Katie Venable. Constitutional questions are directly raised in the counterclaim and cross-claim. Where constitutional questions are directly raised on appeal, the jurisdiction is in the Supreme Court. However, in proceedings that have for their purpose the issuance of original remedial writs, we have concurrent jurisdiction with the Su-

preme Court, notwithstanding constitutional questions are directly raised in the pleading under review. V.A.M.S. Constitution, Article 5, Section 4; State ex rel. City of Mansfield v. Crain, Mo.App., 301 S.W.2d 415. The parties concede that jurisdiction to hear this proceeding is in this court.

The relators herein are the City of Creve Coeur, a municipal corporation, and various officials of said municipality.

[Factual Background]

The events that form the basis of the proceeding before us had their beginning when relator, City of Creve Coeur, filed an action in the Circuit Court of St. Louis County to condemn certain land in the City of Creve Coeur for park and playground purposes under authority of Sections 90.010 and 90.020 RSMo 1949, V.A.M.S., and the applicable provisions of Chapter 88 RSMo 1949, V.A.M.S.

The City of Creve Coeur in its petition for condemnation alleged that it had duly passed Ordinance No. 162, entitled "An Ordinance Providing For The Acquisition Of Property For A Public Park and Playground by Purchase Or Condemnation Within The City Of Creve Coeur, Describing The Property To Be Purchased Or Condemned Therefor." Thereafter follows a description of the property and the owners thereof. The petition sought to condemn two lots owned by the Venables, a tract of land owned by Louis Phillip Dielmann and Mary Dielmann, his wife, and a tract of land owned by Gene Wiley and Marie B. Wiley, his wife. The petition contains a prayer for the appointment of "three disinterested commissioners, freeholders of property in said City, to assess the damages which said owners may severally sustain by reason of the appropriation and condemnation" of the real estate mentioned in the petition.

[Answer, Counterclaim, and Cross-Claim]

After the petition for condemnation and for the appointment of commissioners was filed, defendants, Howard P. Venable and Katie Venable, filed a pleading styled "Separate Answer of Howard P. Venable and Katie W. Venable To Plaintiff's Second Amended Petition For Appointment Of Appraisers, And Separate Counterclaim and Cross-Claim of Howard P. Venable and Katie W. Venable." In connection with the

counterclaim and cross-claim these defendants joined as "third-party defendants" the members of the Board of Aldermen of the City of Creve Coeur, the Mayor, Building Commissioner, and City Attorney of said city and the Special Assistant to the City Attorney. A "Third Party Summons" was issued by the court and served on the aforementioned "third-party defendants." The Venables in their answer "by way of additional affirmative defense," incorporated by reference the allegations contained in certain paragraphs of their counterclaim and cross-claim. The prayer of said counterclaim and cross-claim asked "that third party defendants and the City of Creve Coeur, be enjoined from withholding a Plumbing Permit for Lot 10 * * * and from further proceedings with * * * the condemnation suit now pending * * * and that all third party defendants be enjoined from interfering with and conspiring against defendants, Howard and Katie Venable, to deprive them of their constitutional and civil rights related to residential housing in said city; * * *."

The City of Creve Coeur and the third party defendants, brought in under the counterclaim and cross-claim, filed motions to strike the allegations of the counterclaim and cross-claim and to dismiss said counterclaim and cross-claim. These motions were overruled by the trial court.

The City of Creve Coeur and the "third party defendants" as relators in the instant prohibition proceeding contend that the allegations and matters contained in the counterclaim and cross-claim filed by the Venables and the relief prayed for therein are beyond the trial court's jurisdiction and ask that our preliminary rule in prohibition heretofore issued be made permanent. Our preliminary writ of prohibition prohibited the trial judge from "hearing or considering the allegations and evidence thereon of the cross-claim and counterclaim * * *." The respondent Judge in his return contends that jurisdiction to hear and decide the matters contained in the counterclaim and cross-claim are lodged in the trial court and that our preliminary rule in prohibition should be dissolved.

The issues presented require an examination of the allegations contained in the counterclaim and cross-claim in question. The pleading containing the counterclaim and cross-claim is lengthy and contains repetitive allegations. We think the following is a fair summary of the allegations in the pleading under review.

[*Allegations Summarized*]

It was alleged by defendants, Howard P. Venable and Katie W. Venable, his wife, that they were the owners of two of the lots sought to be condemned and that these lots had been platted and zoned for residential purposes. These defendants had commenced construction of a residence on one of the lots pursuant to a building permit issued to the Ashby Developing and Investment Corporation and said residence is partially completed.

It is further alleged in said counterclaim and cross-claim that plaintiff and the third party defendants have combined and conspired to deprive these defendants of their personal and property rights secured to them by the Constitution and Laws of the United States and the Constitution and Laws of the State of Missouri because defendants are members of the Negro race.

It is further alleged that because of this conspiracy and combination defendants have been denied the right to choose, free from racial discrimination, the City of Creve Coeur in which to make their home.

The overt acts constituting the alleged unlawful scheme, combination and conspiracy as particularized in said counterclaim and cross-claim, we summarize in some respects and in others we recite the allegations verbatim.

[*Overt Acts Alleged*]

It is alleged that plaintiff and third party defendants have:

"authorized and directed emissaries * * * to force said defendants to sell their property to private persons under intimidation and threat of community coercion, official coercion, and condemnation * * *";
 refused to issue to defendants and their contractor a plumbing permit to which they were entitled under the ordinances of the City of Creve Coeur and applicable regulations of the Metropolitan Sewer District;
 administered the affairs of said city for the purpose of discriminating against said defendants;
 enacted "a condemnation ordinance solely for the purpose * * * of denying to them (the Venables) the exercise of their constitutional rights of residence in the City of Creve Coeur * * *";
 authorized the City Attorney for said City

"to institute an action in condemnation against defendants" and "have instituted" a condemnation action and as a result "threaten to condemn and take" defendants' property;

consummated a pattern of illegal discrimination "capstoned by the enactment and threatened consummation of the condemnation ordinance, and proceedings herein referred to, by the exercise of arbitrary and unfettered discretion having no standards nor guides, either in said ordinance or official records, to justify legal conduct and have authorized and initiated condemnation proceedings * * *"

(Emphasis added);

"Yielded to the importunities of citizens of Creve Coeur, motivated solely by reason of racial prejudice against prospective Negro residents * * *"

(Emphasis added);

incurred and authorized obligations payable from municipal funds ostensibly for park purposes; "incurred municipal obligations and expended municipal funds for non-public purposes" in aid of private individuals and associations;

"deliberately ignored warnings concerning the establishment of an unfortunate precedent in handling a situation that will inevitably reoccur * * *";

"Hastily chose a site for alleged park condemnation purposes" and "disregarded the unsuitable topography, location and cost of the area sought to be condemned * * *";
 forced, by reason of the acts aforesaid, the withdrawal of other Negroes proposing to build and live in the City of Creve Coeur;
 "initiated no effort to include the site sought to be condemned for park purposes" within a cooperative program with municipalities located in St. Louis County;

acquiesced on the basis of passion, bias and prejudice in a scheme, device and artifice of a Citizens-Committee whose operation concerned the solicitation and payment of donations to acquire the real estate owned by and surrounding the defendants in order to eliminate occupancy by said defendants;

"authorized, instituted, and conducted condemnation proceedings for a private and not a public purpose";

"illegally granted to residents of Creve Coeur, * * * special and exclusive rights,

privileges, and immunities, to and involving private residential housing in the City of Creve Coeur, seeking to prevent occupancy thereof by Negroes"; joined with other persons unknown to defendants in furtherance of the combination and conspiracy alleged; committed a fraud on said defendants in passing said ordinance and that said ordinance "is merely the product of legislative whim and caprice, violates a common right of defendants, and imposes a burden on them without corresponding benefit to them or the community in which they seek to live * * *."

[Constitutional Violations Alleged]

It is further alleged in said counterclaim and cross-claim that because of the combination and conspiracy and the overt acts committed in the consummation thereof, said defendants are being deprived of liberty and property, without due process of law; are denied the equal protection of the laws and the privileges and immunities of citizens of the United States and the State of Missouri; and are being denied the right to protection of person and property, all contrary to the Constitution and Laws of the United States and the State of Missouri, to wit: Article IV, Section 2 of the Constitution of the United States and the 4th, 5th and 14th Amendments thereof; Chapter 21 of Title 42 U.S.C.A. and particularly Sections 1981-1988 thereof, inclusive, and Article I, Sections 2, 10, 26 and 28, and Article VI, Sections 23, 25 and 26 of the Constitution of Missouri.

It is further alleged that the ordinance condemning defendants' property and the condemnation proceedings pursuant thereto, constitute an unlawful seizure of and threatened seizure of their property and abridges their privileges of national citizenship and that an award in money is not, under the circumstances, just compensation.

In the points relied on by relators they contend there is no authority permitting the joinder of third party defendants in a condemnation proceeding and further contend that condemnation is an action sui generis and does not by its nature authorize a counterclaim or cross-claim. We need not decide if third party defendants may be joined or if a counterclaim or cross-claim is permissible in a condemnation action because

we think another point raised by relators is sufficient to sustain their contention that the respondent has no jurisdiction of the matters contained in the counterclaim and cross-claim filed by the Venables.

[Legislative Motive Questioned]

In this point relators contend that the allegations of the counterclaim and cross-claim simply raise a question of the motive of the legislative body of the City of Creve Coeur in passing the ordinance which condemned the property of the Venables and the other land adjoining the property owned by the Venables. It is the position of the relators that courts cannot inquire into the motives which actuated the legislative body of the City of Creve Coeur in passing the ordinance establishing a public park and playground and further that courts cannot inquire into the propriety or necessity for establishing the park and playground. The authority cited and relied on by relators is *City of Kirkwood v. Venable*, 351 Mo. 460, 173 S.W.2d 8. It will be noted that the appellant's name in the City of Kirkwood case, *supra*, is the same as that of the defendants who filed the counterclaim and cross-claim in the condemnation action filed by the City of Creve Coeur. However, we have been informed there is no relationship between the respective parties.

The case of the City of Kirkwood v. Venable, *supra*, was an action by the City of Kirkwood to condemn four lots in said city for a public park. The defendant Venable, owner of the lots, in her answer alleged that because of its location the property was "not fit or suitable for public use"; that the proceeding was not brought in good faith; that the lots were not sought "to be taken for public use and for public parks or squares for the benefit of the residents of the city," but to destroy the property, demolish the improvements, improve the immediate neighborhood and oust defendant's brother from the premises and community; and that, for the reasons stated, the court was without jurisdiction to condemn the described lands. The trial court entered an order and judgment of condemnation.

On appeal defendant-appellant contended that "the contemplated use of defendant Venable's property was not public"; "that the purpose of the condemnation was * * for the ulterior purpose of removing an alleged eye-sore and the presence of defendant's brother"; that

the purpose was "not a public one in such sense that the city was authorized to condemn therefor," but was "a mere subterfuge to serve a private purpose"; and appellant gave other reasons why the condemnation action must fail. The lots and the improvements on them, sought to be condemned, had through the years become unsightly and looked disreputable.

[City of Kirkwood v. Venable Quoted]

The Supreme Court after pointing to the authority which gave to the City of Kirkwood the right to take private property for the establishment of a public park or public square, then said:

"Section 20, Art. 2 of the Constitution of Missouri, Mo.R.S.A., among other things, provides 'that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public.' In compliance with this provision, this court has repeatedly held that whether the use for which property is taken is public or private is a judicial question.

"The necessity, expediency and propriety of exercising the right of eminent domain, either by the state or by the corporate bodies to which the right has been delegated, are questions essentially political in their nature and not judicial. The grant by the legislature to the city of the right to take private property for use as a public park carried with it also the power to determine the necessity for its exercise, and when action has been taken by the proper corporate body or tribunal in any case, in which the contemplated use is a public one, it is conclusive upon the courts.

"While appellant concedes that respondent has the right to condemn for a public purpose and in good faith to acquire lands for a public park, she contends that the proceeding here is 'a mere sham and subterfuge for the purpose of concealing the ulterior motive behind the whole matter.' Appellant says 'the use alleged was public but the proof showed it was private.' * * *

Appellant's evidence only tends to show that the *motive back of the passage of the ordinance* by the city council for the creation of the city park, and the condemnation of appellant's property for that purpose, was to remedy the unsightly, unhealthy and disreputable conditions existing on the said premises. * * * The evidence is directed to the wisdom, expediency or necessity for the exercise of the right to condemn the property for park purposes. Such evidence is wholly insufficient to establish that the property is being condemned for a private rather than a public purpose.

"In Lewis on Eminent Domain, Third Edition, Vol. I, p. 678, § 370, it is said: 'The courts cannot inquire into the motives which actuate the authorities or enter into the propriety of making the particular improvement.' See, also, McQuillin on Municipal Corporations, Second Edition, § 1588." (Emphases added.) (173 S.W.2d loc. cit. 11, 12.)

The order and judgment of condemnation was affirmed by the Supreme Court.

[Other Cases]

In the case of the City of Kirkwood v. Venable, supra, the Supreme Court quoted from the case of Kessler v. City of Indianapolis, 199 Ind. 420, 157 N.E. 547, 549, 53 A.L.R. 1, 7, wherein the distinction between motive and purpose was clearly defined. In that case the court said:

"In this case, however, the inquiry does not relate to the motives which caused the municipal officers to act, but to the purpose of the taking. While the words motive and purpose are sometimes used as synonymous terms, yet in their application here there is a clear distinction between them. 'Motive' is that which prompts the choice or moves the will thereby inciting or inducing action, while 'purpose' is that which one sets before himself as the end, aim, effect, or result to be kept in view or object to be attained. The purpose for which private property is condemned is the very basis of the right to condemn."

In the case of the City of St. Louis v. Brown, 155 Mo. 545, 56 S.W. 298, 299, the Supreme Court said:

"When it is proposed to take private property for public use, the individual affected has a right to challenge in court the character of the use proposed, and the court will determine whether it be or be not a public use. That is to say, whether or not the use proposed is, in its nature, a public use, is a judicial question; but whether or not the exercise of the authority in the particular case is expedient or politic is a question for the legislative and executive departments of the city government."

The Supreme Court in the case of *Kansas City v. Liebi*, 298 Mo. 569, 252 S.W. 404, 28 A.L.R. 295, held that the propriety, expediency and necessity of a legislative act are purely for the determination of the legislative authority and are not for determination by the courts. The court also held that a legal presumption of validity attends the ordinance passed by the municipal legislative body.

Other cases decided by the Supreme Court wherein the same pronouncements were made are *City of Caruthersville v. Ferguson*, Mo., 226 S.W. 912; *Southern Illinois & M. Bridge Company v. Stone*, 174 Mo. 1, 73 S.W. 453, 63 L.R.A. 301; *St. Louis County Court v. Griswold*, 58 Mo. 175

[Extent of Judicial Authority]

The cases examined by us clearly hold that once it is established that the use for which private property is appropriated is public, the judicial authority of the court is exhausted. This means that the courts have no authority to pass upon the motives of a legislative body in enacting a statute or an ordinance and are powerless to consider the question of what reasons actuated the legislative body in the passing of the statute or the ordinance, as the case may be.

While all of the Missouri cases examined by us hold as aforesaid, the only case wherein the pleading and proof challenged the validity of the motives of the legislative body was the *City of Kirkwood v. Venable*, supra. It was there held, as we pointed out, that when an ordinance condemns private property and it is found by the court that the contemplated use of the property is public, then the action taken by the legislative body "is conclusive upon the courts." It will be observed that the Supreme Court quoted approvingly from *Lewis on Eminent Domain*, Third Edition, Vol. I, p. 678, and we repeat this

quotation: "The courts cannot inquire into the motives which actuate the authorities or enter into the propriety of making the particular improvement."

The language of the Supreme Court in the *City of Kirkwood* case leaves no room for exceptions to or relaxation of the rule announced. We have no authority to create exceptions in the face of what we consider to be a clear mandate, where the motives of a legislative body are challenged. It is our duty to follow the rule laid down for us by the Supreme Court of this state. We have no other course to follow.

[Other Jurisdictions]

The rule of law as laid down by the Supreme Court of this state, finds support in other jurisdictions. The Supreme Court of the United States, in the cases cited below, holds that the necessity and expediency of taking private property for public use is a legislative and not a judicial question and is purely political, is not open to discussion, and that a hearing thereon is not essential to due process of law in the sense of the 14th Amendment to the Constitution of the United States. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167; *Rindge Co., v. County of Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186. The Supreme Court of the United States also holds that the condemnation of lands for public parks is now universally recognized as a taking for public use. *Rindge Co. v. County of Los Angeles*, supra; *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170.

Many opinions may be found in the cases decided by the various United States Circuit Courts of Appeals, some of which are cited below, which contain holdings similar to those announced by the Supreme Court of the United States and the Supreme Court of this state. See *United States v. Certain Real Estate etc.*, 6 Cir., 217 F.2d 920; *Barnidge v. United States*, 8 Cir., 101 F.2d 295; *United States v. Threlkeld*, 10 Cir., 72 F.2d 464, certiorari denied 293 U.S. 620, 55 S.Ct. 215, 79 L.Ed. 708.

We now examine the counterclaim and cross-claim in the light of the rule laid down for us by the Supreme Court of this state.

We think a fair analysis of the pleading under review discloses that the overt acts complained of, which it was alleged constituted the unlawful scheme, combination and conspiracy, antedated the passage of the ordinance. This was

made clear from the allegation in the counterclaim and cross-claim that the pattern of illegal discrimination was "capstoned" by the enactment of the ordinance. Webster's New International Dictionary, Second Edition, Unabridged, defines "capstone" when used in the sense contemplated in the pleading as "The final or crowning part; finishing stroke." Thus, the Venables alleged that the enactment of the ordinance was the finishing stroke that followed the acts constituting the unlawful action, combination and conspiracy.

Again in another part of the pleading it is alleged that the legislative body of the City of Creve Coeur "yielded to the importunities of citizens of Creve Coeur, motivated solely by reason of racial prejudice against prospective Negro residents." This allegation clearly shows that the acts complained of, namely, the importunities of citizens, took place prior to the enactment of the ordinance condemning the property of the Venables.

It is significant to note that some of the allegations in the counterclaim and cross-claim parallel in language and in substance the allegations and contentions of the defendant in the City of Kirkwood v. Venable, supra.

[Wisdom of Legislative Act Attacked]

In the instance case the defendants in their counterclaim and cross-claim allege that the legislative body "hastily chose a site for park condemnation purposes" and "disregarded the unsuitable topography, location and costs of the area sought to be condemned." In the City of Kirkwood case the defendant alleged that the property was "not fit or suitable for public use." Also in the City of Kirkwood case it was alleged that the purpose of condemning defendant's property was to "oust defendant's brother from the premises and community." In the instant case it was alleged in the counterclaim and cross-claim that the ordinance was enacted "solely for the purpose . . . of denying to them (the Venables) the exercise of their constitutional rights of residence in the City of Creve Coeur." The respective allegations just noted are similar.

In the City of Kirkwood case it was contended on appeal "that the contemplated use of defendant Venable's property was not public"; "that the purpose of condemnation was . . . for the ulterior purpose of removing an alleged eye-sore and the presence of the defendant's brother"; "that the purpose was not a public one

in such sense that the City was authorized to condemn therefor" but was "a mere subterfuge to serve a private purpose." Allegations comparable to those are found in the pleading under review herein. The Venables in their counterclaim and cross-claim allege that the legislative body "authorized, instituted, and conducted condemnation proceedings for a private and not a public purpose"; that said ordinance is "merely the product of legislative whim and caprice, violates the common right of defendants, and imposes a burden on them without corresponding benefit to them or the community in which they seek to live * * *"; and, that municipal funds were authorized and expended for "non-public purposes."

We cannot escape the conclusion that the principal allegations of the counterclaim and cross-claim filed by the Venables in the instant case parallel in meaning, if not in exact language, the allegations and contentions made in the case of City of Kirkwood v. Venable, supra. The whole theory of the counterclaim and cross-claim filed by the Venables is that the legislative body of the City of Creve Coeur was actuated by motives that were improper. The allegations in the counterclaim and cross-claim present an issue over which the trial court lacks jurisdiction.

We have carefully studied the cases cited by the respondent in support of his position that the trial court has jurisdiction to consider the matters contained in the counterclaim and cross-claim of the Venables. Before commenting on these cases relied on by the respondent it should be noted that all cases must be read in the light of the facts and the issues before the court when rendering its opinion.

[Respondent's Cases of Reliance]

Respondent's principal reliance is the case of Kansas City v. Hyde, 196 Mo. 498, 96 S.W. 201, 7 L.R.A., N.S., 639. An examination of the facts and issues before the court in that case discloses that the court was investigating the purpose to which the proposed streets, sought to be condemned in the ordinance, were to be put. The entire inquiry in that case was whether or not the legislative body could create a street for the special benefit of a given number of people as against its use by the general public. The court held that no use of the property condemned could be granted if it was inconsistent with the use of the general public. The gist of the court's ruling was that the court in deter-

mining the use to which the condemned property was to be put could "look through a sham and see the truth" in order to determine if the property condemned was going to be put to a private use. The sole issue involved in the case was whether or not the property sought to be condemned was being taken for a public or a private use. The case did not involve any issue or question of motive actuating the enactment of the ordinance condemning the property. For support of our understanding of the issue before the court in the case of *Kansas City v. Hyde*, supra, see *Kansas City v. Aronson*, Mo., 282 S.W.2d 464.

In the case of *Glasgow v. City of St. Louis*, 107 Mo. 198, 17 S.W. 744, relied on by respondent, the question before the court was whether "the officers and agents of the city combined with the defendants to wrong and injure the plaintiffs and the public by vacating the street and converting the same to private use * * *." The sole issue decided by the Supreme Court was whether the land condemned was to be used for a public or private purpose. The court ruled that "the municipal assembly, in enacting the ordinance, intended to aid and foster a large manufacturing industry; but it is equally clear that the ordinance was passed with due regard to the public interests."

Another case relied on by respondent is *State ex rel. State Highway Commission v. Curtis*, 359 Mo. 402, 222 S.W.2d 64, loc. cit. 68. In that case the Supreme Court stated the issue before it in the following language:

"As we understand respondent's brief, he contends that relator's petition shows that it is attempting to take more land than reasonably necessary * * that the excess of land over what is so reasonably necessary will not be taken for public use; that the question of 'public use' is a judicial question which respondent had jurisdiction to determine * * *."

The Supreme Court in disposing of the issue presented said:

"The power to locate a state highway, to determine its width * * and the extent of land necessary for economical and proper construction are vested in the sound discretion of the State Highway Commission, uncontrolled by the courts except to compel strict compliance with the statutes and to prevent the taking of private property for a private or non-public use."

There was no issue of motive before the court, the sole issue being whether the land was taken for a private or non-public use.

[Cases Distinguished]

The same must be said about the case of *State ex rel. State Highway Commission of Missouri v. Shultz*, 241 Mo.App. 570, 243 S.W.2d 808, cited by respondent, wherein the facts and issues before the court were similar to those before the court in the *Curtis* case, supra. In the *Shultz* case the Springfield Court of Appeals relied, inter alia, on the statements we have quoted above from the *Curtis* case.

Lawrence County, on Behalf of *Tunnell v. Johnson*, Mo., 269 S.W.2d 110, 111, cited by respondent, was dismissed by the Supreme Court because there was no final judgment in the case and therefore the appeal was dismissed. However, the court did point out that the only question presented was "whether the taking of defendants' land is for a public or private use * * *."

Respondent cites as supporting authority the case of *Kansas City v. Reinwald*, Mo., 270 S.W.2d 863, 869. The sole issue before the court in that case was clearly one of use of the property sought to be taken. The Supreme Court held that "because the public nature of the contemplated use is patent, the judgment of dismissal" of the lower court was erroneous. The lower court had entered an order dismissing the petition of the City of Kansas City seeking to condemn certain land.

[Another Inapposite Case]

The final Missouri case relied on by respondent is *Glueck Realty Company v. City of St. Louis*, Mo., 318 S.W.2d 206. This was a suit by a taxpayer to enjoin the City of St. Louis and city officials from carrying out the terms of city ordinances providing for acquisition and condemnation of realty for off-street parking facilities and the issuance of revenue bonds for financing acquisition of the realty and construction of the parking facilities. The suit also asked for a declaratory judgment that said city ordinances were invalid. The trial court dismissed the action. The Supreme Court in affirming the action of the trial court held that the plaintiff-taxpayer had a complete and adequate remedy in the condemnation proceedings and could not maintain the action under review. We cannot

conceive what support respondent gains from this case, because, here again, the only issue presented by the taxpayer's petition is found in the allegation "that the purposes of the ordinances were not public but private purposes, intended and designed to serve the private interests of specific department stores and banks * * *." The sole issue presented by the petition was whether the property was being taken for private rather than public purposes.

[Cooper v. Aaron Relied Upon]

Another case urged by respondent as authority for his position is *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 1404, 3 L.Ed.2d 5. The case involved the enforcement of an order of the Supreme Court of the United States contained in an opinion of that court (*Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873) wherein the District Courts were directed to require "a prompt and reasonable start toward full compliance," and to take such action as was necessary to bring about the end of racial segregation in the public schools "with all deliberate speed."

The Little Rock (Arkansas) District School Board adopted a plan of desegregation which was approved by the District Court (*Aaron v. Cooper*, 143 F.Supp. 855) and affirmed by the United States Circuit Court of Appeals, 8 Cir., 243 F.2d 361. When the School Board sought to go forward with its plan, other state authorities pursued a program designed to prevent racial desegregation in the schools. An amendment to the State Constitution was passed "commanding the Arkansas General Assembly to oppose 'in every Constitutional manner the Unconstitutional desegregation decisions'" of the United States Supreme Court. Pursuant to this amendment to the Constitution the Arkansas General Assembly passed a law relieving school children from compulsory attendance at racially mixed schools and a law establishing a State Sovereignty Commission. Other actions were taken by the Governor of the State of Arkansas and other state authorities designed to prevent the enforcement of the School Board's plan. The

passing of the amendment to the Constitution, the laws passed by the Arkansas General Assembly and the actions of the Governor and others were actions that on their face bespoke defiance of the School Board's plan drafted pursuant to the mandate of the Supreme Court in *Brown v. Board of Education*, supra. These actions were a direct attempt to nullify the mandate of the Supreme Court of the United States. The facts before the court did not involve the right of a legislative body to condemn property. The statements by the court in no way overrule or add exceptions to the rule laid down by it in *Joslin Mfg. Co. v. City of Providence*, supra, and *Rindge Co. v. County of Los Angeles*, supra.

[No Exception Found]

We are aware of the seriousness of the charges contained in the counterclaim and cross-claim filed by the Venables and because of the gravity of the allegations we have conducted an exhaustive research to determine if an exception to the rule, as announced in the *City of Kirkwood* case, was authorized. We found no authority authorizing an exception, and none has been cited to us by respondent. The motive which actuates and induces the legislative body to enact legislation is wholly the responsibility of that body and courts have no jurisdiction to intervene in that area. *City of Kirkwood v. Venable*, supra.

The ordinance passed by the City of Creve Coeur condemns the property for use as a public park and playground. If the land is to be used for this purpose, there is no doubt about it being taken for a public use. However, nothing we have said in this opinion will prevent the Venables from showing as a defense to the condemnation action that the property condemned will not be used as a public park and playground.

In view of what we have said, no cause has been shown by respondent why a final judgment in prohibition should not be entered. The preliminary rule of prohibition heretofore issued should be made permanent. It is so ordered.

WOLFE, P. J., and ANDERSON, J., concur.

TRANSPORTATION Airplanes—Texas

Jose B. CALVA v. AMERICAN AIRLINES, Inc.

United States District Court, District of Minnesota, Fourth Division, October 7, 1959, 177 F.Supp. 238.

SUMMARY: A Minnesota citizen of Mexican origin sued an airline in a federal district court in Minnesota for breach of a passenger carriage contract and for unjust discrimination practiced on him at the Dallas, Texas, airport, through removing him from an airplane upon which he had a reservation. The defendant denied any discrimination, justifying the removal because there was no space for plaintiff, who had failed to meet a re-confirmation requirement. On a motion to transfer venue to Texas under a statute permitting a civil action's transfer, for the convenience of parties and in the interest of justice, to another district where it might have been brought, defendant relied on the factors that: the Texas law of exemplary damages would be applicable; defendant would incur greater cost and inconvenience in transporting several Dallas employees to Minnesota to testify than plaintiff would incur in going to Texas; and defendant has only minimal association in Minnesota in maintaining a one-man sales office. Plaintiff contended that he should be allowed to maintain the action in his home district, which is more convenient to him, whereas racial tension and prejudice against persons of Mexican descent would preclude a fair jury trial in Texas. Though abstaining from considering the racial prejudice matter, the court denied the motion, holding that the factors raised by defendant were insufficient to outweigh plaintiff's inconvenience if the suit were transferred, in view of the substantial weight that must be accorded to plaintiff's choice of the district wherein he permanently resides.

TRANSPORTATION Boycotts, Buses—Alabama

Calvin WOODS v. STATE.

Court of Appeals of Alabama, December 8, 1959, 116 So. 2d 400.

SUMMARY: An Alabama state trial court convicted a defendant of fomenting a boycott of a Birmingham transit company's buses in order to hinder their operation and of advising and encouraging others that they had a duty not to ride such buses. On appeal, the state court of appeals reversed and remanded because the alleged offenses, not common law crimes, had been created by statute which had been repealed long before the acts complained of were committed.

CATES, Judge.

Woods appeals from his conviction on a misdemeanor complaint. The first count charged him with fomenting a boycott of the Birmingham Transit Company's buses in order to hinder their operation. This charge uses verbatim the operative words of Code 1940, T. 14, § 59, first clause.

The second count relies on T. 14, § 61, in charging Woods ("without a just cause or legal

excuse") advised and encouraged others that they had a duty not to ride these buses and is also expressly couched in the words of § 59.¹

1. Count 2 reads pertinently: "Calvin Woods, * * * did without just cause or legal excuse, advise, encourage members or persons attending a church over which he was presiding the duty, propriety or expediency of not riding the buses of the Birmingham Transit Company, a corporation, a lawful business engaged in the transportation of passengers, in violation of Chapter 20, Title 14, Code of Alabama 1940, * * *"

Section 61 makes advocacy of a duty to violate § 59 a separate offense.²

Wood's alleged offense occurred in November, 1958.

The first clause of § 59 was held void in *Carter*

2. § 59, first clause, reads: "Any person, firm, corporation or association of persons who, without a just cause or legal excuse, wilfully or wantonly does any act with the intent or with reason to believe that such act will injure, interfere with, hinder, delay, or obstruct any lawful business or enterprise, in which persons are employed for wages; * * * shall be guilty of a misdemeanor." § 61, in pertinent part, reads: "Any person, * * * who, without a just cause or legal excuse shall advise, encourage, * * * the necessity, duty, propriety, or expediency of doing so or practicing any of the acts or things made unlawful by this chapter, * * * shall be guilty of a misdemeanor."

v. State, 243 Ala. 575, 11 So.2d 764. Act No. 52, approved May 30, 1951 (Acts 1951, p. 265), repealed³ § 59 in toto.

The alleged offenses were not crimes at common law. Since both counts depend exclusively upon § 59 and since the basic statute was repealed some seven years beforehand, the judgment below is

Reversed and rendered.

3. The acts complained of having taken place after repeal are not influenced by the general saving statute (Code 1940, T. 1, § 11). "Under the common law rules of construction and interpretation the repeal of a penal statute operated to efface the act from the statute books as though it had never existed. * * * Sutherland, *Statutory Construction* (3d Ed.), § 2046.

TRIAL PROCEDURE

Confessions—Arkansas

Frank Andrew PAYNE v. STATE of Arkansas.

Supreme Court of Arkansas, February 22, 1960, 332 S.W.2d 233.

SUMMARY: A 19-year-old Negro was convicted of murder and sentenced to death by an Arkansas state court. On appeal, he assigned as errors by the trial court the denial of his motion to quash the jury panel because of alleged racial discrimination in their selection, and the acceptance of an allegedly coerced confession. The state supreme court affirmed, holding that the trial court properly admitted the confession after first hearing voluminous testimony in chambers that defendant had not been mistreated or threatened in any way. 226 Ark. 910, 295 S.W.2d 312, 2 Race Rel. L. Rep. 171 (1956). On certiorari, the United States Supreme Court, two justices dissenting, reversed upon the determination that defendant's confession had been coerced. The point relating to jury selection was not discussed, the court refusing to assume that the same issue would be present upon a new trial. 356 U.S. 560, 3 Race Rel. L. Rep. 419 (1958). The second trial resulted also in a conviction and death sentence, and defendant appealed once more. The state supreme court this time reversed, three justices dissenting. It was held that the trial court on the second trial had committed prejudicial error in admitting evidence as to an alleged re-enactment by defendant of the crime some two hours after he had given the coerced confession, because the re-enactment was but a part of the confession and was, therefore, also coerced and unlawfully obtained.

HOLT, Justice.

On a charge of murder in the first degree, appellant, Frank Andrew Payne, was, on January 11, 1958, tried, found guilty as charged and his punishment fixed by the jury at death by electrocution. We affirmed, *Payne v. State*, 226 Ark. 910, 295 S.W.2d 312. On appeal to the Supreme

Court of the United States, the judgment was reversed for error in introducing in evidence a coerced confession of appellant, *Payne v. State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed. 2d 975. Thereafter, in April 1959, appellant was again tried and a jury again found him guilty of murder in the first degree and fixed his punish-

ment at death in the electric chair. The present appeal followed.

For reversal, appellant assigns eight alleged errors. After reviewing them all, we find merit in but one of appellant's assignments and that is number five which is: "That the Court erred in admitting into evidence the actions of the appellant in connection with an alleged re-enactment of the crime immediately following the giving of an involuntary confession."

[Coerced Confession]

Appellant, a Negro 19 years of age, brutally murdered his employer on the night of October 4, 1955 in the office of his victim's lumber yard in Pine Bluff, Arkansas. (Reference is made to the first appeal for a more complete statement of the facts) Appellant's first confession, as indicated, was held to be coerced by the Supreme Court of the United States on the undisputed facts which are recited in that opinion as follows: "The undisputed evidence in this case shows that petitioner, a mentally dull 19-year-old youth, (1) was arrested without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and his right to counsel, as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police 'that there would be 30 or 40 people there in a few minutes that wanted to get him,' which statement created such fear in petitioner as immediately produced the 'confession'. It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice,' and that its use before the jury, over petitioner's objection, deprived him of 'that fundamental fairness essential to the very concept of justice,' and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment."

The facts in the present case show that appellant, after he made and signed the above

confession at about three o'clock in the afternoon in the presence of the chief of police, police officers and others, including a newspaper reporter, was later on the same afternoon, at about five o'clock, removed in the car of the chief of police to the scene of the crime and in the presence of the same officers and others who had witnessed his confession, and without being allowed to consult counsel or anyone, was directed to re-enact the crime which he proceeded to do. In reacting the crime, he went through actions essentially and, in effect, what he had said in the confession less than two hours before. He demonstrated where he had picked up an iron bar from behind the door, how he had walked over to the desk where his employer was and struck him, then going behind the counter and striking decedent several more times, finally taking the wallet from decedent's body, some money from the cash drawer, and then fleeing.

[Re-enactment Coerced]

It seems to us and we hold, that this re-enactment amounted to but a part of his coerced confession, and was also coerced and unlawfully obtained. Our rule in this state on the admissibility of confessions was announced in the early case of *Love v. State*, 22 Ark. 336, where we held: "Confessions are not admissible against a party charged with crime, unless freely and voluntarily made, and the onus is upon the State to prove them of this character. When the original confession has been made under illegal influence, such influence will be presumed to continue and color all subsequent confessions, unless the contrary is clearly shown", and in *Corley v. State*, 50 Ark. 305, 7 S.W. 255, we said: "The rule is established in this state,—in accordance with the unvarying current of authority elsewhere,—that a confession of guilt, to be admissible, must be free from the taint of official inducement proceeding either 'from the flattery of hope or the torture of fear', citing *Bullen v. State*, 156 Ark. 148, 245 S.W. 493. We also held in *Turner v. State*, 109 Ark. 332, 158 S.W. 1072, 1073: "Where improper influences have been exerted to obtain a confession from one accused of crime, the 'presumption arises that a subsequent confession of the same crime flows from that improper influence.' * * * that such presumption 'may be overcome by positive evidence that the subsequent confession was given free from undue influence.'"

[The General Rule]

The general rule regarding the admissibility of a subsequent confession following an involuntary and coerced confession is stated in 20 Am. Jur., 424, Evidence, in this language: "If one confession is obtained by such methods as to make it involuntary, all subsequent confessions made while the accused is under the operation of the same influences are also involuntary. It is immaterial, in this connection, what length of time may have elapsed between the two confessions, if there has been no change in the circumstances or situation of the prisoner. Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made. However, a confession otherwise voluntary is not affected by the fact that a previous one was obtained by improper influences if it is shown that these influences are not operating when the later confession is made. * * * The evidence to rebut the presumption that the subsequent confession, like the original confession, is involuntary must be presented by the prosecution and must be given at the time the subsequent confession is offered in evidence, provided the court is then cognizant that the accused has made a prior involuntary confession. The evidence to rebut the presumption must be clear and convincing, however."

A review of this record convinces us that the fear and coercion that tainted the first confession were present in the re-enactment which, as indicated, we characterize and hold to be, in effect, a second coerced confession and hence evidence adduced at the re-enactment is also inadmissible and prejudicial to appellant.

Accordingly, the judgment is reversed and the cause remanded.

ROBINSON, J., concurs.

HARRIS, C. J., and McFADDIN and WARD, JJ., dissent.

ROBINSON, Justice (concurring).

I concur for the purpose of pointing out that this Court does not of its own volition find that the confession made by the appellant was involuntary. In fact, we have specifically held that the confession was voluntary; *Payne v. State*, 226 Ark. 910, 295 S.W.2d 312; but the Supreme Court of the United States overruled this Court

on that point. *Payne v. State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed. 975.

The United States Supreme Court decision that the confession was involuntary is the law of the case. Since it has been thusly decided that the confession was not voluntary, it must be considered as involuntary by this Court in reaching a conclusion as to whether the re-enactment of the crime by the defendant was, therefore, also involuntary. As pointed out in the majority opinion, the re-enactment was so closely connected with the confession as to form a part of the same transaction and is, therefore, inadmissible.

Dissent

HARRIS, Chief Justice (dissenting).

The only question, as I view it, is whether the re-enactment of the crime by Payne was voluntarily done, or under duress and compulsion. The first Payne case was reversed by the United States Supreme Court under the holding that a confession of the defendant, admitted into evidence, was obtained by coercion. At no place in that Opinion is mentioned the re-enactment of the crime. I do not agree that Payne was acting under the operation of the same influences present when the confession was made. Evidence was offered in the first case that at the time the confession was made, Payne was told that thirty or forty people were outside the jail wanting in to get the defendant. According to Payne, the Chief of Police had told him "if I wanted to make a confession, he would try to keep them out." No such threat occurred during the re-enactment, which took place at the building where Robertson was killed, a considerable distance from the jail. The testimony reflects that appellant's actions on the premises were entirely voluntary, and that he demonstrated the manner in which the crime was committed without "prodding" or suggestions from the police. For instance, relative to the murder weapon, a piece of iron, Payne, in relating from the witness stand his actions at the lumber company building, stated:

"Q. Where did you go first when you came in the rear of the building, where did you stop, did you stop? A. We stopped at the door if I am not mistaken.

"Q. How far down from Mr. Robertson's desk? A. I wouldn't know to be exact.

"Q. Is it further than an arm's reach away from the desk where you stopped? A. Yes, sir, it is.

"Q. Did you indicate at that point anything? A. Yes, sir.

"Q. What did you indicate there? A. At the door?

"Q. That is at the door. A. I indicated that I picked up an iron, I was picking up something there.

"Q. You picked up something there—you said an iron what? A. I said I was indicating where I picked up something.

"Q. You indicated you picked up something—who lead you to that spot, Frank? A. Who led me to that spot?

"Q. That's right—who told you that was the spot where you picked up something? A. *No one.* (my emphasis)

"Q. No one did that, but you stopped at that point, didn't you? A. I did.

"Q. And you indicated that you picked up something there. Then where did you go next? A. To Mr. Robertson's desk."

He subsequently pointed out the place where he had thrown the weapon, which, according to the evidence, was within inches of the spot where it was found by a radio newsman. Appellant does not claim that he was forced to re-enact the crime, or that anybody told him what actions to perform. There is no claim that he was threatened or abused. Certainly, he had no reason to fear mob action at the time. The most that he said was that he was "scared." This certainly was not unusual, for most anyone who is arrested has a feeling of fear, and this is probably even true where people are stopped by officers and given traffic tickets. The point is that the officers did nothing to cause that fear. As stated, the sole question is whether this re-enactment was voluntary and free from any improper influence, and not traceable to any prohibited influence previously exerted either by promise made by way of previous inducement, or by threats or violence. *Smith v. State*, 74 Ark. 397, 85 S.W. 1123. The sheriff and police officers all testified that Payne received no promises, nor

was he mistreated in any way in order to obtain the re-enactment, and Bill Miles, city editor of the Pine Bluff Commercial, testified that following the re-enactment, he walked over to Payne and asked if he had been mistreated in any way, and that the defendant replied that he had not.

I am fully cognizant of the rights given a defendant under our Constitution, and I am entirely persuaded that Payne received every safeguard afforded by these guarantees. At the trial itself, the jury was instructed, *at the request of defendant*, as follows:

"Before any statements or acts made by the defendant to the officers or other persons can be considered by you as evidence in the case you must believe from the testimony that such statements or acts were freely and voluntarily made and done without any threat or fear of punishment and without any promise or hope of reward. If you believe from the evidence in this case that any statements or acts that were made or done by the defendant were freely and voluntarily made by him you should consider such statements and acts along with all the testimony in the case in determining the guilt or innocence of the defendant. If you believe that said statements and acts were not free and voluntary, that they were induced by fear of punishment or promise of reward, you should not consider such statements and acts for any purpose whatsoever."

Certainly it is proper to assume that jurors consider all of the instructions given by the court. The jury (which incidentally, included two members of appellant's race), by its verdict, if it considered the evidence of re-enactment at all, apparently found that these acts of the defendant were not coerced, and there being no evidence to the contrary, the jury's verdict should be allowed to stand.

I strongly feel that the judgment should be affirmed.

McFADDIN and WARD, JJ., join in this dissent.

TRIAL PROCEDURE

Confessions—South Carolina

STATE v. Quincy BULLOCK.

Supreme Court of South Carolina, November 16, 1959, 111 S.E.2d 657

SUMMARY: A Negro, convicted and sentenced to death for murder, appealed to the South Carolina Supreme Court, charging error by the trial judge, *inter alia*, in having allowed into evidence confessions (1) which allegedly had been involuntarily made to law enforcement officers in violation of his due process rights under the Fourteenth Amendment and (2) of which an exact copy allegedly had not been given to him as required by state statutes. Noting that the evidence relating to the voluntariness of the confessions was in sharp conflict, the court held that the trial judge had properly submitted the issue to the jury, having correctly instructed the jury to give the confessions such weight as they deemed proper if they found them to have been made voluntarily without fear or hope of reward, but otherwise not to consider them. The court further found that the factual issue of whether a copy of the confessions had been given to defendant had also been properly submitted to the jury upon correct instructions. As no errors were found, the judgment of the trial court was affirmed. The part of the opinion dealing with the confessions follows.

MOSS, Justice.

The appellant, Quincy Bullock, was tried upon an indictment charging him with the murder of Mrs. Carolyn Barfield Walshock on August 3, 1958. He was tried on October 24, 1958. The appellant was found guilty as charged and sentenced to death by electrocution.

This appeal followed. The appellant charges error on the part of the trial judge: (1) In refusing his motion for a continuance; (2) In allowing the introduction into evidence of the alleged confessions of the appellant, it being asserted that the said confessions were obtained in violation of the rights of the appellant under the due process clause of the Fourteenth Amendment of the United States Constitution; and that the officers who took the written confession failed to comply with Sections 1-64 and 26-7.1 of the 1952 Code of Laws of South Carolina . . .

We next consider the question of whether there was error in permitting the introduction into evidence of the alleged confessions of the appellant.

In the case of *State v. Chasteen*, 228 S.C. 88, 88 S.E.2d 880, 884, it was said:

"The question of whether a confession is voluntary is one which is addressed to the Court in the first instance. If there is an issue of fact as to the voluntariness of a confession, it should be admitted and the jury, under proper instructions, allowed to make the ultimate determination as to its volun-

tary character and also its truthfulness. *State v. Scott*, supra, 209 S.C. 61, 38 S.E.2d 902; *State v. Brown*, supra, 212 S.C. 237, 47 S.E.2d 521; *State v. Livingston*, supra, 223 S.C. 1, 73 S.E.2d 850."

It is axiomatic that a confession is not admissible unless it is voluntary. It necessarily follows that the burden rests upon the State to show that it was voluntary, and there is no presumption of law that it was voluntary. *State v. Clinkscales*, 231 S.C. 650, 99 S.E.2d 663, and *State v. Fuller*, 227 S.C. 138, 87 S.E.2d 287.

We have also held that the mere fact that a confession is made while the accused is in the custody of an officer does not render it inadmissible. However, the conduct of the officer obtaining the confession will be rigidly scrutinized and the fact that it is made while the accused is under arrest is a circumstance, along with the other facts and circumstances to be taken into consideration by the jury by determining its voluntariness. *State v. Clinkscales*, supra.

In the case of *State v. Henderson*, 74 S.C. 477, 55 S.E. 117, 118, it is stated:

"In deciding the question of fact whether such a confession is free from threat or inducement, the conduct of the officer will be rigidly scrutinized, but the conclusion of the circuit judge on that issue of fact cannot be reviewed by this court unless so manifestly erroneous as to show an abuse of judicial discretion." See *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819,

also, *State v. Miller*, 211 S.C. 306, 45 S.E.2d 23, and *State v. Livingston*, 223 S.C. 1, 73 S.E.2d 850.

When the State offered the confessions of the appellant in evidence a prompt objection was made to such admission by counsel for him. The trial Judge then excused the jury, and in the absence thereof, heard the testimony of the officers concerning the circumstances of the confessions. These officers testified positively that the appellant was not at any time intimidated, abused or threatened. They further testified that his confessions were freely and voluntarily given.

The record shows that when the question of admissibility of the confessions arose, and after the jury had been excused, the Sheriff of Dillon County was examined by the Court as a witness. We quote from the record the questions asked by the Court and the answers given by the Sheriff:

"Q. Let me ask you this. If any statement was made to you by the defendant, was any force used in getting him to make a statement? A. No, sir.

"Q. Was any promise made—A. No, sir.

"Q. (Continues) to him?

"Q. By you or anyone in your presence? A. No, sir.

"Q. Was any hope held out to him if he would make a statement? A. No, sir.

"Q. Was he put under any threat? Was any threat made to him? A. No, sir.

"Q. Was there any act of violence committed toward him by you or anyone in your presence? A. No, sir.

"Q. Was any promise made to him? A. None, sir.

"Q. That if he would tell you, certain things may be done for him? A. No, sir.

"Q. Was any threat made against him at any time? A. No, sir.

"Q. Did any officer or any other person have his hands about the defendant or try to force the defendant or put fear in the defendant at any time in your presence? A. No, sir.

"Q. If he did make a statement, was it free and voluntary? A. It was, sir."

After the Sheriff had been examined by the trial Judge he was extensively cross examined by counsel for the appellant. The testimony of the Sheriff was corroborated by a deputy Sheriff who typed the confessions of the appellant. It

should be pointed out that while the trial Judge was making the preliminary examination as to whether or not the confessions were admissible as evidence the appellant was not called to the stand to refute or deny the testimony of the Sheriff and the deputy as to the voluntariness of the confessions, nor did the appellant call any other witness to testify thereabout. The record reveals that prior to the time the trial Judge admitted the confessions into evidence, that he charged the jury that it was their duty and responsibility to determine if the confessions had been made by the appellant, and if found to have been made freely and voluntarily, without fear or reward, or hope of reward, or the slightest fear or slightest hope of reward, or without duress, then the jury should give to them such weight as they deem proper. He also charged the jury that if they found that the statements had been involuntarily made, that they should not consider them. With this charge and admonition to the jury, the trial Judge admitted the confessions into evidence. We find no error in so doing.

[Testimony of Abuse]

In the case of *State v. Sanders*, 227 S.C. 287, 87 S.E.2d 826, 829, the defendant was indicted for murder. An objection was made to the admission of a confession on the ground that the same was involuntary. The accused testified that he was cursed and threatened by one of the officers, which was denied by that officer, and his denial was corroborated by other officers, and by the stenographer who took the confession in shorthand and transcribed the same. The notes were produced at the trial, as well as the signed transcript which was admitted in evidence. The trial Judge, in the absence of the jury, heard the testimony of the appellant and one of the officers concerning the circumstances of the confession, and concluded that it was admissible. Upon appeal to this Court, it was said:

"In the absence of the jury the court first heard the testimony of appellant and one of the officers concerning the circumstances of the confession and concluded that it was admissible; however, he submitted to the jury the issue of whether it was free and voluntary and, therefore, whether it should be considered or rejected by them. This was the proper procedure and there was no error thereabout. *State v. Carson*, 131 S.C. 42,

126 S.E. 757; *State v. Scott*, 209 S.C. 61, 38 S.E.2d 902; *State v. Miller*, 211 S.C. 306, 45 S.E.2d 23; *State v. Brown*, 212 S.C. 237, 47 S.E.2d 521, certiorari denied 335 U.S. 834, 69 S.Ct. 22, 93 L.Ed. 386; *State v. Livingston*, 223 S.C. 1, 73 S.E.2d 850, certiorari denied 345 U.S. 959, 73 S.Ct. 944, 97 L.Ed. 1379; *State v. Waitus*, 224 S.C. 12, 77 S.E.2d 256; *Id.*, 226 S.C. 44, 83 S.E.2d 629, certiorari denied 348 U.S. 951, 75 S.Ct. 439, 99 L.Ed. 743."

[*No Testimony on Coercion*]

It appears from the record that at the time the State offered the confessions of the appellant in evidence, the sole testimony before the trial Judge was that such confessions had been voluntarily made by the appellant. There was no testimony to the contrary. The procedure outlined in the case of *State v. Sanders*, *supra*, had been followed, except the appellant had not availed himself, nor was he required to do so, of the opportunity through his own testimony, or that of other witnesses, to contradict the *prima facie* showing made by the State as to the voluntariness of the confessions. The issue of the voluntariness of the confessions was made when the appellant took the stand during the presentation of his defense, to deny that he had freely and voluntarily made the confessions.

The appellant asserts that the admission into evidence of his alleged confessions violated his right to due process under the Fourteenth Amendment to the Constitution of the United States.

As is heretofore stated, the dead body of Mrs. Carolyn Barfield Walshock was discovered on August 3, 1958. The appellant, a negro man, forty-six years of age, an employee of a restaurant, was arrested at his home on August 7, 1958. He was not questioned on the date of his arrest. However, on Friday morning, August 8, 1958, according to the testimony of the State, the appellant was questioned for a few minutes. The testimony was that on Friday afternoon at about 2:30 or 3:00 o'clock, the officers questioned the appellant, removing him for such purpose from the new jail to the old jail of the county. He was questioned for about thirty to forty minutes. It appears that a number of people had gathered near the old jail and the officers took the appellant to the office of the Judge in the Courthouse, interrogating him there for about an hour to an hour and fifteen minutes. The appellant ad-

mitted the ownership of a pistol after he had been told that the officers knew that he had purchased a pistol from one Rowell. The record shows that Rowell testified on the trial of this case that he sold to the appellant the pistol in question. It further appears that a sister-in-law of the appellant was called in while the appellant was being questioned in the office of the Judge, and told the appellant about seeing him with a pistol. It appears that after this happening the officers went with the appellant to his home and there the officers obtained the pistol from behind a loose piece of ceiling in the wall between the ceiling and the weather boarding under the window in the appellant's bedroom. It appears that the appellant had not admitted the shooting of the deceased at this time. At the end of the interrogation in the Judge's office, the appellant was removed from the Dillon County jail to the jail of adjoining Marion County. On the way from Dillon to Marion the car in which the appellant was riding was momentarily stopped at a motel to pick up one of the investigating officers. Upon arrival at the Marion County jail yard the appellant made an oral confession. The Sheriff testified that he went back to the Marion County jail on Saturday and Sunday and talked to the appellant. It appears from the testimony that on Sunday night, August 10, 1958, the Sheriff with one of his deputies brought the appellant back from Marion to Dillon, and that they stopped by the cemetery where the alleged shooting took place and he pointed out the road that he traveled in approaching the car in which the parties were at the time of the shooting. It appears that on August 11, 1958, that the appellant signed his first confession.

[*In Presence of Officers*]

This confession was executed in the presence of Sheriff Jasper D. Rogers and Deputy Sheriffs Allen and Anderson.

It appears that after the appellant had signed the foregoing confession that he accompanied the officers for the purpose of reconstructing the crime. After he had returned from this trip he signed a second statement, wherein he says that he instructed the Sheriff the place to put the car in the cemetery. He says that he showed how the back doors to the car were open and how the two were lying in the back seat with their heads pointing in the same direction. He also stated what position he was standing in when he fired

into the car and pointed out the route that he took up the sewage line. He was then taken to the point where the body was found and in about five minutes pointed out the spot where he left the body. He says that he placed Deputy Allen in the position the girl was sitting when he shot her in the head, and that he then led the officers back out of the swamp through the edge of the field along the route that he took when he left the place where the body of the deceased was found. This confession was executed in the presence of Sheriff Jasper D. Rogers and Deputy Sheriff H. A. Allen.

Each of the foregoing statements acknowledged that they had been read to him by "Mr. Rogers", the Sheriff, and that he had received a copy of such statement.

The testimony of the officers is that after the statements, or confessions, were written out that they were read slowly to the appellant, and that he agreed to the correctness of such statements and signed same. It was also testified that he was given a copy of the statements so signed.

The appellant testified that he signed the confessions after two cotton sheets had been placed over his head and he had suffered a severe beating, and had been kicked by the officers. He says that as a result of the beating he was crippled in his hip. There was also testimony by the wife of the appellant that the appellant had been beaten and because thereof "he couldn't half walk" and his face was swollen to the extent that his left eye was almost closed. The appellant asserts that he put his name on the confessions because he was fearful of what might happen to him if he didn't. He says that when he was taken to the cemetery and to the place where the body of the deceased was found that "I point out anywhere" "so they wouldn't get ahold of me no more". The appellant also denied receiving copies of the statements which he signed. This testimony in behalf of the appellant, as to the treatment he had received prior to the signing of the confessions, was emphatically denied by the officers. It was also testified in behalf of the State that the appellant, without assistance from anyone, pointed out the spot where he left the body of the deceased near the swamp.

[Evidence in Conflict]

The evidence relating to the voluntariness of the confessions of the appellant is in sharp con-

flict. The officers testified that the confessions were freely and voluntarily given. The appellant's testimony is that the confessions were involuntary. Under the testimony we think the trial Judge properly submitted the issue of voluntariness of the confessions to the jury. *State v. Waitus*, 224 S.C. 12, 77 S.E.2d 256. Neither can it be said that the circumstances under which the confessions were obtained violate those fundamental principles which are protected by the Fourteenth Amendment to the Constitution of the United States. *Gallegos v. State of Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86; *Stein v. People of State of New York*, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522.

The appellant asserts that he was held *incommunicado* from the time of his arrest on Thursday, August 7, until August 11. The record does not confirm this contention. It appears that while the appellant was in custody he saw his wife and sister-in-law. There is an absence of testimony that any one sought to see the appellant and was refused such right, nor does the record show that the appellant requested to see any person and such privilege was refused. It appears that counsel for the appellant fully examined all witnesses and no attempt was made to show that the appellant had been held *incommunicado*.

[Continuously Questioned]

The appellant also asserts that he was continuously questioned by the officers. This is not confirmed by the record. It does appear from the record that the appellant, after minimum questioning, made an oral confession within twenty-four hours after his arrest. We have heretofore recited the period of questioning and there is no necessity for a repetition of such at this point.

The appellant contends that he was moved from one place to another and finally to a jail in an adjoining county, all in the presence of a large number of officers and under the threat of mob violence. It is true that the appellant was questioned at several different places but it does not appear that this fact in anywise influenced the making of the confessions by the appellant. As to the threat of mob violence, it is a sufficient answer to quote the testimony of the appellant thereabout.

"Q. Were there any people on the outside of the jail that you saw? A. No, sir, I didn't see none.

"Q. Any crowd around the jail? A. No, sir."

The confession of the appellant is corroborated in a number of details.

The appellant also complains that the officers taking his confessions did not comply with Sections 1-64 and 26-7.1 of the 1958 cumulative supplement to the 1952 Code of Laws of South Carolina.

Section 1-64 provides:

"Whenever any person employed by the State or any county, city or municipality thereof, or any part of any such governing body, shall take a written statement in any investigation of any kind or nature from any person, the person receiving or taking the written statement shall give to the person making the statement a copy thereof and shall obtain from the person making the statement a signed receipt for the copy so delivered."

Section 26-7.1 provides:

"No witness in any preliminary hearing or in any criminal judicial proceeding of any kind or nature shall be examined or cross-examined by any examiner, solicitor, lawyer or prosecuting officer concerning a written statement formerly made and given to any person employed by the State or any county, city or municipality thereof, or any part of any such governing body, unless it first be shown that at the time of the making of the statement the witness was given an exact copy of the statement and that before his examination or cross-examination the witness was given a copy of the statement and allowed a reasonable time in which to read it."

The appellant testified that he did not receive a copy of his confessions at the time he signed same. The testimony on behalf of the State was that the appellant was given copies of the confessions at the time he signed same. The con-

fessions themselves admit receipt of the copies. Thus it appears that the question of compliance with Sections 1-64 and 26-7.1 of the Code became a factual issue for the jury to decide. The trial Judge submitted this factual issue to the jury with appropriate instructions thereabout. He likewise submitted to the jury the question of whether or not the confessions of the appellant were freely and voluntarily made. The jury was also instructed that if they were not so made they must be disregarded. He further instructed the jury that if they found as a fact that the confessions were freely and voluntarily made, and that the appellant had received a copy of same, then they could give to the confessions such weight as the jury deemed proper.

We should point out in connection with the objection made by the appellant to the admission into evidence of his confessions, that the appellant as a part of his defense offered in evidence copies of the confessions which had previously been introduced in behalf of the State. The appellant offered these confessions generally and without any limitation upon his purpose in offering same.

In the case of *State v. O'Neal*, 210 S.C. 305, 42 S.E.2d 523, 526, this Court said:

"An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector. 64 C.J., Sec. 193, Page 172. Under this well known rule, the appellants are in no position to complain of the court's ruling."

We find no error on the part of the trial Judge in admitting as evidence the confessions of the appellant.

What we have heretofore said disposes of all questions raised by the appellant, but in keeping with our invariable rule of *in favorem vitae*, we have carefully examined the record for any errors affecting the substantial rights of the appellant, even though not made a ground of appeal. We find no such errors.

Judgment of the lower Court is affirmed.

TRIAL PROCEDURE

Juries—Arkansas

Luther BAILEY v. Lee HENSLEE, Superintendent of the Arkansas State Penitentiary.

United States Court of Appeals for the Eighth Circuit, April 27, 1959, 264 F.2d 744.

SUMMARY: A Negro convicted of rape in an Arkansas state court appealed to the state supreme court contending that the trial judge erred in refusing to quash the jury panel because of the alleged systematic exclusion of Negroes. The court found no evidence of such exclusion and affirmed the conviction. 302 S.W.2d 796, 2 Race Rel. L. Rep. 997. *Cert. denied*, 355 U.S. 851, 2 Race Rel. L. Rep. 1097. The accused then filed a petition in the trial court alleging that he was denied the right to subpoena the jury commissioners, but the petition was denied, and the state supreme court affirmed, holding that the question of permitting the jury commissioners to testify had either been finally decided or had been waived in the first trial. 313 S.W.2d 388, 3 Race Rel. L. Rep. 758, *cert. denied* "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." 79 S.Ct. 101, 3 Race Rel. L. Rep. 868. The accused then petitioned a federal district court in Arkansas for a writ of habeas corpus, but the writ was denied on the ground that petitioner had not exhausted the state remedies available to him. The court held that the question of whether the accused's constitutional rights were violated by the trial court's denial of process to compel the attendance of the jury commissioners was not brought to the attention of the state supreme court and was therefore waived. Assuming that the accused originally had a right under the Fourteenth Amendment to have compulsory process of this kind, the court concluded that constitutional rights may be waived at trial unless related to a substantial claim going to the very foundation of a proceeding by denying one a fair trial, and such was not the case here. 168 F. Supp. 314, 4 Race Rel. L. Rep. 170 (E.D. ARK. 1958). On appeal, the Court of Appeals for the Eighth Circuit affirmed, holding that if the ruling denying process on the jury commissioners was a technical denial of a constitutional right, there was no proof that the accused was injured by it. That opinion is reproduced below. (Subsequently the United States Supreme Court denied a petition for a writ of certiorari "without prejudice to a further application for writ of habeas corpus in the appropriate United States district court, on the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution." 80 S.Ct. 408, 4 Race Rel. L. Rep. 850, *supra*.)

GARDNER, Chief Judge.

This appeal is from an order denying appellant's petition for writ of habeas corpus. Appellant, a negro, was charged in the Circuit Court of Pulaski County, Arkansas, with the crime of rape upon a white woman. On the trial before a jury he was convicted and upon a verdict of guilty the court imposed a death sentence as required by the statutes of Arkansas. When the case was called for trial defendant interposed a motion to quash the petit jury panel on the ground that in the selection of the panel negroes had been systematically excluded. On this motion he submitted the testimony of the deputy clerk of the court, who, based on the records of the clerk's office, testified in substance as follows: That his record shows that two negroes were selected by the jury commissioners for the March 1952 term, out of a total of 24. It

is the general procedure of this court to select 24 jurors on the regular panel and 12 alternates. These two negroes actually served. There was one negro on the jury panel for the September 1952 term. There were two negroes selected for the March 1953 term. Five negroes served during the September 1953 term; three were on the extra panel and two on the regular panel. For the special panel five jurors were selected out of 21. There is nothing to indicate on the record whether they were white or colored. There were two negroes on the March 1954 term. There were 24 persons on the special panel; only five were selected. The record does not indicate whether the remainder were colored or white. Two negroes were selected on the panel for the September 1954 term. There was a special panel for that term of 100 names; seven persons were selected; they were all white. He did not

know whether the remaining people on the list were colored or white. Three negroes served on the March 1955 regular panel. One person was used from the special panel of 100 names. Four negroes were included in the 100. Only one person out of 100 was used on the September 1955 special panel. There were three negroes on the regular panel. Three negroes were selected on the regular panel for the March 1956 term. The first special panel selected has 150 names on it; it does not indicate colored and white. The first 100 on this list were ordered to report this morning; 27 of them are here; none are negroes. "Record of Poll Tax receipts issued in Pulaski County for the years 1954 and 1955. Total number colored (1954) 10,180 14.8% (1955) 8,557 13.3%. Total number white (1954) 58,484 85.2% (1955) 55,980 86.7%." Following this testimony counsel for appellant requested the court to allow the jury commissioners for all the terms from the 1952 March term until the 1956 March term, inclusive, to testify as to the matters and allegations set out in his motion to quash the regular panel and the special panel of petit jurors. To this request the court responded:

"The court is going to overrule that motion. The record will reflect what they did."

Appellant had requested subpoenas for certain witnesses which were duly issued and served but he had not prior to the opening of his trial secured subpoenas for the jury commissioners. At the hearing on motion to quash the panel appellant made no offer to prove to what the jury commissioners would, if called, testify. Following his conviction and sentence he moved for a new trial on various grounds, but did not allege as error the refusal of his request that the jury commissioners be subpoenaed. His motion for new trial being denied, he appealed to the Supreme Court of Arkansas alleging 31 errors but did not allege as error the refusal of the court to order subpoenas issued for the jury commissioners as witnesses, but did allege error in the overruling of his motion to quash the panel on the ground that in the selection of the petit jury panel negroes had been systematically excluded and also alleged that the evidence was insufficient to prove the guilt of the defendant beyond a reasonable doubt. On the hearing in the instant proceeding for writ of habeas corpus the records of defendant's trial in the state court and on his appeal to the Supreme Court of

Arkansas and his application for writ of certiorari to the Supreme Court of the United States were by stipulation made a part of appellant's showing.

[Robbery, Assault]

It appears from the record that shortly after midnight on June 14, 1956 appellant entered the home of the prosecuting witness through a window, ravished the occupant, stole \$190 from her purse, and seriously beat and bruised her. In doing so he lost his billfold in her room, and the prosecuting witness' purse was found in appellant's automobile. The evidence of guilt is without substantial dispute. Responding to appellant's assignment that negroes had systematically been excluded from the jury panel, the Supreme Court of Arkansas, *Bailey v. State*, 227 Ark. 889, 302 S.W.2d 796, 799, said:

"We think the court did not err in refusing to allow the jury commissioners to testify. They had not been subpoenaed to appear as witnesses and were not present. Furthermore, after the court had denied his request that they be permitted to testify, appellant failed to show what the jury commissioners would have said had they testified. See *Turner v. State*, 224 Ark. 505, 275 S.W.2d 24.

"Appellant next argues that the above testimony of Louis Rosteck alone was sufficient to show racial discrimination. We do not agree. We think Rosteck's testimony,—which speaks for itself,—does not show an intentional and systematic limitation of Negroes on the jury list."

After the Supreme Court of the United States had denied certiorari, appellant proceeded for relief under a so-called post conviction statute, which reads as follows:

Act 419 of 1957. "Section 1. Any person convicted of a felony and incarcerated under sentence of death or imprisonment who claims that the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of this State, or that the court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis,

or other common law or statutory remedy, may institute a proceeding under this Act to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction or in any other proceeding that the petitioner has taken to secure relief from his conviction.

• • • •

In this proceeding he charged that he had been denied rights guaranteed him by the Constitution of the United States in that he had been denied compulsory process. The trial court denied any relief and in doing so, among other things said:

"The only question to be determined by this Court is: Was the fact that Bailey was denied compulsory process for the jury commissioners from 1952 to 1956 inclusive, finally passed on or waived in the proceedings resulting in the conviction?"

"A careful examination of the original record in this case fails to show that the question now attempted to be raised was even mentioned therein, either in the Bill of Exceptions or motion for a new trial. Certainly, even under the broad provisions of Act 419, the record cannot now be amended to include something that was left out of the Bill of Exceptions originally."

[Trial Court Affirmed]

On appeal from the court's order denying relief the Supreme Court of Arkansas affirmed the decision of the trial court. *Bailey v. State*, 313 S.W.2d 388, 390. In the course of its opinion affirming the trial court it is said, *inter alia*:

"The defendant was represented by able counsel who had every opportunity to make his record on the point and bring it up on appeal. If he did so, the alleged error was finally litigated. If this was not done, then the alleged error was waived."

From this decision appellant applied to the Supreme Court of the United States for a writ of certiorari which was denied,

"• • • without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court."

Bailey v. State, 358 U.S. 869, 79 S.Ct. 101, 3 L.Ed.2d 101. Following the denial of his peti-

tion for writ of certiorari appellant instituted by petition for writ of habeas corpus the proceeding resulting in the order denying his petition from which this appeal is prosecuted. In his petition he seeks relief on the ground:

"I. That the Conviction under which the plaintiff is held and was sentenced is void in that he was denied compulsory process for obtaining witnesses in his favor in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

"II. That the petitioner has exhausted all other remedies before filing this petition." On hearing of his petition he did not ask for compulsory process to secure the attendance as witnesses of the jury commissioners nor did he offer to prove what the commissioners' testimony would be if they had been examined as witnesses in his behalf, but as herein observed the petition was presented on the records of the trial and hearing in the state courts.

[Alleges Denied Due Process]

On this appeal appellant urges (1) appellant was denied due process as guaranteed by the Fourteenth Amendment to the United States Constitution, (2) appellant has not waived his Constitutional rights, and (3) appellant has exhausted his state remedies.

There is no evidence in the record that the jury commissioners excluded negroes from the petit jury panel, neither is there anything to indicate that the jury commissioners would have testified to anything different from the testimony of the deputy clerk. Neither in the proceedings in the state court nor in the proceedings in the United States District Court was there any offer of testimony as to what the commissioners would testify. There seems to have been a record in the clerk's office which formed the basis of the deputy clerk's testimony. The Supreme Court of Arkansas held that this was insufficient to show a systematic exclusion of negroes from the jury panel and in the absence of any proof or offer of proof as to what the jury commissioners would testify the ruling of the court in declining to have them subpoenaed, if error, would seem to be clearly without prejudice. The ruling of the court was a matter of record and, if error, appellant's remedy was by appeal to the Supreme Court

based upon such alleged error. We have consistently held that an application for habeas corpus cannot serve as an appeal. *Carruthers v. Reed*, 8 Cir., 102 F.2d 933, 939, certiorari denied 307 U.S. 643, 59 S.Ct. 1047, 83 L.Ed. 1523; *In re Edwards*, 8 Cir., 106 F.2d 537; *Buie v. King*, 8 Cir., 137 F.2d 495; *McCoy v. Pescor*, 8 Cir., 145 F.2d 260; *Berkoff v. Humphrey*, 8 Cir., 159 F.2d 5. Not having urged this alleged error on appeal the error, if any, was waived. *Carruthers v. Reed*, supra; *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469; *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268. In *Brown v. Allen*, supra, in a concurring opinion by Mr. Justice Frankfurter it is said [73 S.Ct. 444]:

"Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a State's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal Constitution may be waived at the trial, *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank v. Mangum*, 237 U.S. 309, 343, 35 S.Ct. 582, 593, 59 L.Ed. 969. When a State insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal. See *Adams v. United States ex rel. McCann*, supra, 317 U.S. at page 274, 63 S.Ct. at page 239. Compare *Sunal v. Large*, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982, with *Johnson v. Zerbst*, 304 U.S. 458, 465-469, 58 S.Ct. 1019, 1023-1025, 82 L.Ed. 1461."

After having made his record in the trial court appellant deliberately omitted urging the question which he now seeks to urge, either in his motion for a new trial or on appeal. This we think was a waiver and constituted a failure to exhaust his state remedies. It is worthy of note that in the post-conviction proceeding brought by appellant he did not call the jury commissioners to testify, nor did he ask for

compulsory process to secure the attendance of these witnesses; neither did he offer to prove what testimony these jury commissioners would have given had they been called as witnesses, nor indeed did he offer any testimony that negroes had systematically been excluded from the petit jury panel. In this connection it is to be noted that the Supreme Court of Arkansas on the second appeal held that appellant had waived his right to claim error on the question he now urges. So likewise in the instant proceeding the United States District Court held there was a waiver. Concerning the question of waiver the trial court said:

"While the rule just stated may not be applicable to one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543, this is not such a case. Here there is no indication that anyone concerned was trying to prevent the defendant from having a fair trial, or that he was denied a fair trial; he was represented by appointed counsel from the time of his arraignment, more than a month before the trial date, and he was afforded process for certain witnesses, the denial of process for the jury commissioners being evidently purely collateral and incidental to the circuit court's determination that the motion to quash should be decided solely upon the basis of the records in the office of the circuit clerk bearing upon the selection of jurors. In its rulings on questions of evidence during the course of the trial proper, and in its instructions to the jury the circuit court appears to have been careful to protect all of the legitimate rights of the petitioner, and the verdict and judgment were supported by the evidence."

We have examined the entire record with great care and are convinced that the guilt of the defendant was proved by the evidence beyond a reasonable doubt, and if the ruling denying him compulsory process for the production of the jury commissioners as witnesses was a technical denial of a Constitutional right, there is no proof that he was injured thereby, and he has clearly waived this Constitutional right. In *Carruthers v. Reed* [8 Cir., 102 F.2d

939], *supra*, in holding that appellants had waived their Constitutional rights, we said:

"Petitioners waived their right to review the judgment of the state court in the regular manner, and habeas corpus in the cir-

cumstances cannot be substituted for such review."

We are convinced that he had a fair trial. The order appealed from is therefore affirmed.

TRIAL PROCEDURE

Juries—Idaho

STATE of Idaho v. James McCONVILLE.

Supreme Court of Idaho, February 2, 1960, 349 P.2d 114.

SUMMARY: Prior to trial in an Idaho state court on charges of lewd and lascivious conduct with a minor, defendant, an Indian, moved to quash the jury panel on the ground that the array selected for that term of court included only one or two Indians and was not therefore representative of the different races residing in the county. The court refused to grant the challenge; and, after the trial and conviction, defendant appealed, asserting that the denial of his motion was error. The state supreme court affirmed because the record was barren of proof or offer of proof of racial discrimination in the selection of the jury array. It was held that a mere showing that a class is not represented, without an additional showing that the absence is due to discrimination, is an insufficient basis for challenging a jury panel.

TAYLOR, Chief Justice.

The information charges defendant (appellant) with lewd and lascivious conduct under I.C. § 18-6607. Trial resulted in a verdict of guilty as charged. From judgment of conviction entered upon the verdict, and an order denying a new trial, defendant has appealed.

The crime allegedly was committed June 12, 1958, against the person of the prosecutrix Bernadette Boncheau, a female child of the age of eleven years, by defendant, her grandfather, both being full-blooded Nez Perce Indians.

Defendant next contends that the court erred in refusing to grant his challenge to the jury array and panel on grounds that there was not a representative number of persons of defendant's race thereon.

Prior to the commencement of the trial, defendant moved to quash the jury panel on the ground that the array selected for that term of court included only one or at the most two Indians and therefore was not representative of the different races residing in the county.

This court ruled upon a somewhat similar situation in *State v. Walters*, 61 Idaho 341, 102 P.2d 284. We therein held that upon a motion

to quash a jury panel, the burden of showing substantial, actual, or presumptive prejudice to the rights of a defendant rests upon the moving party, and must be established by a preponderance of the proofs. *Morris v. State*, 62 Okl.Cr. 337, 71 P.2d 514; *Norris v. State of Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074. We also held in *State v. Walters*, *supra*, that a systematic and arbitrary exclusion from the jury panel of any class or race of people because of their race and color constitutes a denial of the equal protection of the laws to anyone falling within that class, who may be charged with crime and placed on trial therefor. Fourteenth Amend. U.S. Const.; *Hale v. Commonwealth of Kentucky*, 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050; *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757; *Norris v. State of Alabama*, *supra*; *Scott v. State*, 29 Okl.Cr. 324, 233 P. 776, 779; *Powell v. State*, 60 Okl.Cr. 267, 63 P.2d 113, 117.

[Proof of Discrimination Lacking]

Here the record is barren of any proof or offer of proof that would tend to show discrimination, or a systematic exclusion of persons of defendant's race, in the selection of the jury array. A

mere showing that a class is not represented is insufficient. It must be shown that its absence is due to discrimination. *Fay v. People of State of New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043, rehearing denied 332 U.S. 784, 68 S.Ct. 27, 92 L.Ed. 367. The motion to quash, and the challenge to the panel, were properly denied.

The judgment is affirmed.

SMITH and McQUADE, JJ., and SPEAR, District Judge, concur.

PORTER, C. J., sat at the hearing, but died before the Court reached its decision.

KNUDSON, J., not participating.

TRIAL PROCEDURE

Juries—Maryland

George GALLOWAY v. WARDEN OF MARYLAND PENITENTIARY.

Court of Appeals of Maryland, January 14, 1960, 157 A.2d 284.

SUMMARY: At a hearing on a petition under the Maryland Post Conviction Procedure Act, it was contended, *inter alia*, that petitioner had been unable to secure a fair and impartial jury in that he could not get one composed exclusively of members of his own race. Subsequent to a dismissal of the petition, leave to appeal was sought from the state court of appeals. The application was denied because it was not shown that defendant had even requested a jury, and because defendant's contention regarding his right to an impartial jury, not having been raised by his competent and experienced counsel at trial, had been waived in that proceeding.

HAMMOND, Judge.

George Galloway, the petitioner, was tried before Judges Dickerson and Saylor of the Criminal Court of Baltimore City on September 26, 1945, for four burglaries, two assaults with intent to murder, one rape, one assault with a deadly weapon, and the usual lesser crimes which accompany such charges. He was found guilty of rape and sentenced to life imprisonment; as to the other crimes, he was convicted of four rogue and vagabond charges, of the two assaults with intent to murder, of one burglary, and of the assault with a deadly weapon, for which crimes he was sentenced to a total of thirty-seven years imprisonment to run concurrently with the life sentence.

[Post Conviction Petition]

Years later, Galloway brings this petition for relief under the Post Conviction Procedure Act in which, asserting innocence, he contends that:

- (1) his rights to due process were violated by those in authority prior to and during trial;
- (2) the police of Baltimore City framed him;

- (3) the prosecuting witness perjured herself in mistakenly identifying him, since only after considerable police coaching did she say that "she thought he looked like the man;"

- (4) as evidenced by a quotation from a contemporary news article, the trial judge gave him a life sentence instead of the death penalty because of the "bare possibility that the prosecuting witness in the rape case might have mistakenly identified him" and, therefore, there being doubt, he should not have been convicted;

- (5) his past record was used to convict him;

- (6) his alibi witnesses were never called;

- (7) his court appointed lawyer did not defend him properly.

Counsel was appointed to represent the petitioner below and a hearing was held from which petitioner was absent (his presence is not mandatory under the Act. *Plump v. Warden, Md.*, 153 A.2d 269). At the hearing the additional complaint was made that petitioner had been unable to secure a fair and impartial jury in that he could not get one composed exclusively of members of his own race. Judge Cullen dismissed the petition and leave to appeal is sought.

The lack of specifics prevents contentions one

and two from having significance or force. Likewise, the allegation of perjury and police coaching in the third contention shows nothing to indicate any state participation in the use of the alleged perjured testimony beyond "police coaching," a term which, without particularization, is too general to constitute a basis for relief. In addition, this contention, like the fourth, fifth and sixth, involves the sufficiency of the evidence and the question of guilt or innocence, which could have been raised on appeal but is not now available. *State v. D'Onofrio, Md.*, 155 A.2d 643; *Price v. Warden, Md.*, 151 A.2d 166. The alleged ineptitude of counsel claimed in his seventh contention cannot help petitioner. *Banks v. Warden, Md.*, 155 A.2d 697.

[Jury Not Requested]

As to Galloway's contention raised at the hearing below that he should have been tried by a jury exclusively composed of members of his own race, there is nothing to indicate that he even requested a jury, much less a jury so constituted. He was represented at trial by competent, experienced counsel and, without implying that the contention has merit, we point out that it was not raised then and therefore was "waived in the proceedings resulting in the conviction." Code (1957, 1959 Supp.) Art. 27, Sec. 645A(a). Cf. *Grammar v. State*, 203 Md. 200, 100 A.2d 257.

Application denied.

TRIAL PROCEDURE

Juries—South Carolina

STATE v. Charles Edward BROOKS.

Supreme Court of South Carolina, November 9, 1959, 111 S.E.2d 686.

SUMMARY: At the trial in a South Carolina state court of a Negro charged with the rape of a white woman, defense counsel requested the court to ask jurors (1) "Would you have any prejudice against a defendant because of his color?" and (2) "Would it take less evidence for you to render a verdict against a colored person charged with rape . . . against a white female, than it would . . . against a white person charged with rape [of] . . . a colored female?" The court asked the first question but not the second, and allowed counsel to ask jurors on *voir dire* examination such questions as to race as they chose. After conviction and sentence of death, appeal was taken to the state supreme court, which affirmed, holding, *inter alia*, that the trial court had soundly exercised its discretion concerning the nature and extent of juror examination, the substance of the second question being included in the first one. An excerpt from the court's opinion on this point is reprinted below.

STUKES, Chief Justice.

Appellant, who is a young unmarried Negro man, was convicted of rape and sentenced to death. Secs. 16-71, 72, Code of 1952.

• • •

Turning to the second question, the members of the jury were put upon their *voir dire*. Sec. 38-202, Code of 1952. Defense counsel framed several questions which they requested the court to ask the jurors. Among them were: "No. 2. Would you have any prejudice against a defendant because of his color?" And "No. 3. Would it take less evidence for you to render

a verdict against a colored person charged with rape or assault with intent to ravish against a white female, than it would for you to render a verdict against a white person charged with rape or assault with intent to ravish a colored female?" The court complied with respect to No. 2 and asked it from the bench, but he declined No. 3 because it was embraced in substance in No. 2. The court permitted counsel to ask questions as part of the jurors' examination on *voir dire*, and they did ask questions as they chose, including questions relating to race. (This is taken from the agreed statement in the Transcript of Record.) We agree with the trial judge

that the substance of No. 3 is included in No. 2 which he allowed and asked. Moreover, counsel asked other similar questions with the permission of the court. Such examination of jurors, its nature and extent, are within the discretion of the trial judge. *State v. Carson*, 131 S.C. 42, 126 S.E. 757. It appears to have been exercised soundly here.

Appellant cites to the contrary *State v. Higgs*,

143 Conn. 138, 120 A.2d 152, 54 A.L.R.2d 1199. But it appears from the opinion in that case that the trial court excluded from the examination on *voir dire* all questions concerning race prejudice. Not so here, as has been seen. The cited case is the subject of a note in 9 S.C. Law Quarterly 485.

Affirmed.

TRIAL PROCEDURE

Stay of Execution—Kentucky

Hugo TAUSTINE, Judge, etc., et al. v. Sam THOMPSON et al.

Court of Appeals of Kentucky, March 13, 1959, 322 S.W.2d 100.

SUMMARY: A Negro man, on trial in the Louisville, Kentucky, police court on loitering and disorderly conduct charges, moved for dismissal on the ground that he was being deprived of liberty without due process of law under the Fourteenth Amendment. The motions were overruled and he was fined \$10 on each charge. He then petitioned a circuit court for habeas corpus against the police court judge and bailiff and the county sheriff, alleging: his innocence of the charges; lack of evidence to support the convictions; a consequent violation of due process under the Fourteenth Amendment; and nonappealability of the convictions to any state court because of the smallness of the fines. It was also alleged that as a poor person he would have to serve out the fines in jail, which would be accomplished before he could prepare and file a petition for certiorari, and thus the question would become moot prior to hearing by the United States Supreme Court; and that the police judge had suspended execution of judgment for only 24 hours, the maximum allowable by statute, so that he could file this petition for habeas corpus. The circuit court granted the writ, upon finding from the police court records that "these federal constitutional claims are substantial and not frivolous," in order that petitioner could file a petition for certiorari by May 4, 1959. The police court judge and other defendants appealed. Inasmuch as a collateral attack through habeas corpus proceedings will not lie unless judgments are void, and as the police court's judgment was not void because that court had jurisdiction of petitioner and the subject matter, the court of appeals reasoned that the circuit court had actually granted a stay of execution and merely called it a writ of habeas corpus since the two are somewhat akin. The judgment was reversed, the court holding that the circuit court had erred because under state statutes only the court of appeals has jurisdiction to grant such a stay. However, as a majority of the court agreed that petitioner had raised a real question as to his Fourteenth Amendment rights which could not be tested without a stay, it did not require him to file an original action with it but ordered the police court to direct the bailiff and sheriff to release him on bond and to stay execution on the judgments until June 1 so that he could petition the United States Supreme Court for certiorari. Three justices dissented. [Note: The Supreme Court granted certiorari (27 L.W. 3362, 4 Race Rel. L. Rep. 849 [1959]) and reversed the police court. 80 S.Ct. 624, 5 Race Rel. L. Rep. 7, *supra* (1960)].

SIMS, Judge.

This appeal is from a judgment of the Jefferson Circuit Court, Common Pleas Branch, Fifth Division, granting Sam Thompson a writ of habeas corpus against Hon. Hugo Taustine, Judge of the Police Court of Louisville, Kenneth Wildt, Bailiff of that court and Solon Russell, Sheriff of Jefferson County, wherein appellants were ordered to release Thompson from custody upon his executing bond in the sum of \$35 in order that he may file in the United States Supreme Court on or before May 4, 1959, his petition for a writ of certiorari. The judgment further recites that if Thompson does not file his petition for certiorari on or before that date, or if such writ is not granted, or if the judgments of the police court are affirmed by the Supreme Court, then Thompson shall surrender himself and serve the judgments of the police court.

[Petition in Circuit Court]

The petition in the circuit court averred Thompson was convicted in the police court on the charges of loitering and of disorderly conduct and he was fined \$10 in each case, which fines are too small to be appealable to any court in Kentucky, KRS 26.080(1); that appellee is a poor person and cannot pay these fines and must serve them out in jail at the rate of \$2 per day. The petition further avers Thompson is not guilty, of the charges upon which he was convicted and that no evidence was introduced to support such judgments; that at the close of the prosecution's evidence in each case Thompson moved for the dismissal of the charge on the ground that he was deprived of his liberty without due process of law under the Fourteenth Amendment of the Federal Constitution, which motions were overruled; that the two fines would be served out in jail in ten days which would not allow him sufficient time to prepare and file his petition for certiorari and the question would be moot before he could get a hearing on his petition in the Supreme Court; that appellee applied to the police judge for a stay of execution, but under KRS 26.070 (2) the police judge can only suspend the execution of judgment for twenty-four hours, which twenty-four hour stay was granted in order that he might file his petition for a writ of habeas corpus.

The opinion of Hon. Lawrence Grauman, Judge of the Jefferson Circuit Court, which granted the writ of habeas corpus, recites that

an examination of the records of the police court, including the transcripts of evidence of the two trials, "shows that these federal constitutional claims are substantial and not frivolous." The majority of this court agree with this statement of Judge Grauman. It will be noted the judgment of the circuit court does not in reality grant appellee a writ of habeas corpus but only a stay of execution of his fines and orders him released from jail on bond until May 4, 1959, so that he may file a petition for certiorari in the Supreme Court.

[Habeas Corpus Inappropriate]

Patently, Judge Grauman realized that the writ of habeas corpus is a collateral attack on the judgments and will not lie unless the judgments are void. *Commonwealth v. Crawford*, 285 Ky. 382, 147 S.W.2d 1019; *Smith v. Buchanan*, 291 Ky. 44, 163 S.W.2d 5, 145 A.L.R. 813; *Bircham v. Buchanan*, Ky., 245 S.W.2d 934. Here, the police court had jurisdiction of the subject matter and of Thompson and it is manifest the judgments are not void. To meet the exigency of the situation, Judge Grauman granted Thompson a stay of execution to allow him time to prepare and file his petition for certiorari in the Supreme Court and merely called his order a writ of habeas corpus as the order is somewhat akin to such writ.

Judge Grauman must have had in mind § 110 of the Kentucky Constitution which gives this court the power "to issue such writs as may be necessary to give it a general control over inferior jurisdiction." But § 110 does not give to a circuit court such control of courts inferior to it. Circuit courts in this Commonwealth have no prohibitive jurisdiction over inferior courts where such inferior courts are acting within their jurisdiction even though erroneously. If an inferior court is proceeding erroneously within its jurisdiction and irreparable injury will result to a litigant, with no adequate remedy at law, then the prohibitive jurisdiction lies in this court under § 110 of our Constitution. *Potter v. Trivette*, 303 Ky. 216, 197 S.W.2d 245. As the Louisville Police Court was acting within its jurisdiction, it appears that the circuit court erred in granting appellee a stay of execution, as only this court may do that under § 110.

While we must reverse the judgment, the majority of this court are not inclined to put appellee to the trouble and expense, as well as the delay, of filing an original action in this

court when we know that our decision will be to direct the Louisville Police Court to stay execution of its two judgments and release appellee on bond for three months to give him time to prepare and file in the Supreme Court his petition for certiorari. Therefore we have concluded to dispose of the matter in this opinion.

[Stay of Execution Granted]

Appellee appears to have a real question as to whether he has been denied due process under the Fourteenth Amendment of the Federal Constitution, yet this substantive right cannot be tested unless we grant him a stay of execution because his fines are not appealable and will be satisfied by being served in jail before he can prepare and file his petition for certiorari. Appellee's substantive right of due process is of no avail to him unless this court grants him the ancillary right whereby he may test same in the Supreme Court. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

Appellants urge that as 28 U.S.C.A. § 1257 (3) provides for review by certiorari of a final judgment of the highest state court in which a decision may be had where the infringement of a constitutional right is claimed, and as 28 U.S.C.A. § 2101(f) provides a stay may be granted by a Justice of the Supreme Court when application is made under Rule 27 of that court, 28 U.S.C.A., that appellee should make application for a stay to a Justice of the Supreme Court rather than to this court. Our answer to this argument is that it is often difficult to contact a Justice of the Supreme Court and may necessitate a trip to Washington. In this instance appellee may have great difficulty after preparing his petition for a stay to get same in the hands of a Supreme Court Justice in the short time of ten days.

In *Walters v. Fowler*, Ky., 280 S.W.2d 523, appellant sought a writ of prohibition to prevent the collection of a \$5 fine, averring that his right of due process under the Fourteenth Amendment had been violated in the imposition of the fine and he would suffer great and irreparable injury unless the writ was granted, since he had no remedy by appeal. We denied the writ of prohibition and held that the imposition and collection of a \$5 fine was not such great injustice or irreparable injury as would justify the granting of the writ. The distinction between that case and the instant one is *Walters* did not ask a writ of prohibition so he might go to the United States Supreme

Court for its determination of whether or not he had been denied due process, while in the case at bar appellee seeks a stay of execution for that very purpose. It is only in extreme cases like the one at bar where a person wants to go to the Supreme Court that we will interfere with an inferior court under § 110 when an unappealable fine has been imposed.

[Judgment Reversed]

We reverse the judgment of the Jefferson Circuit Court because it was without jurisdiction to enter the stay of execution. But, we hereby direct Hon. Hugo Taustine, Judge of the Louisville Police Court to stay until June 1, 1959, the execution of the two judgments and direct Kenneth Wildt, Bailiff of that Court, and Solon F. Russell, Sheriff of Jefferson County, to release appellee from satisfying or serving in jail the two fines imposed on him by the judgments until June 1, 1959, on condition that appellee execute bond in the sum of \$35 with good surety guaranteeing he will surrender himself to the police court on June 1, 1959, if he does not file a petition for certiorari in the Supreme Court before that date, or if the Supreme Court denies his petition, or if it affirms the judgments of the Louisville Police Court.

The judgment is reversed and the clerk of this court will prepare a mandate in conformity with this opinion and cause copies of same to be sent to Judge Taustine, Bailiff Wildt and Sheriff Russell.

MONTGOMERY, C. J., and MOREMEN and STEWART, JJ., dissenting.

Dissent

MONTGOMERY, Chief Justice (dissenting).

According to the majority opinion, Sam Thompson complains that he has been deprived of due process of law under the Fourteenth Amendment to the Federal Constitution because the evidence in each of two cases was insufficient to sustain the conviction. The fine in each case was under the appealable amount. No complaint is made that the police court in which he was tried did not have jurisdiction of the offense or the person. The question is: May the sufficiency of the evidence to convict in a state court be reviewed in a federal court as a violation of due process under federal law? The answer is: No.

In *United States ex rel. Weber v. Ragen*, 7 Cir.,

1949, 176 F.2d 579, it was held that the due process of law clause does not enable federal courts to review errors of state law, however material under state law, and a federal district court sits only to determine whether the proceedings in the state court amount to a violation of federal constitutional rights. Habeas corpus cannot be utilized to correct mere errors of law committed in a trial in a state court or to try such questions as sufficiency of evidence to sustain a conviction. *Petition of Sawyer*, D.C.Wis. 1955, 129 F.Supp. 687, affirmed, 7 Cir., 229 F.2d 805, certiorari denied *Sawyer v. Borczak*, 351 U.S. 966, 76 S.Ct. 1025, 100 L.Ed. 1486, rehearing denied 352 U.S. 860, 77 S.Ct. 24, 1 L.Ed.2d 70.

It would appear that Thompson is attempting to secure a review under a claim of infringement

of constitutional right. 28 U.S.C.A. § 1257(3). The cited cases make it obvious why he did not seek relief in the federal district court. Instead, he is attempting to get a review to which he is not entitled, under either the federal or state law, by perverting the habeas corpus process. Both this Court and the lower court recognized that the judgments of conviction were not subject to collateral attack since they were not void. In two recent cases, *Thompson v. Wood*, Ky., 277 S.W.2d 472, and *Walters v. Fowler*, Ky., 280 S.W.2d 523, this Court refused to grant relief by prohibition in similar situations.

I see no reason to violate our rule and grant any relief herein, and for this reason I respectfully dissent.

MOREMEN and STEWART, JJ., join in this dissent.

LEGISLATURES

CIVIL RIGHTS LEGISLATION

'Civil Rights Act of 1960'—Federal Statutes

Public Law 86-449, 86th Congress (H.R. 8601) approved by the President May 3, 1960, provides penalties for obstruction of court orders; makes it a federal crime to flee across a state line to avoid prosecution for damaging property; restricts the transportation of explosives; requires the preservation of voting records and sets up penalties for their destruction; authorizes a system of referees in disputed voting rights cases; and allows the federal government to provide schooling for children of military personnel where it is not otherwise available.

AN ACT to enforce constitutional rights, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Civil Rights Act of 1960."

TITLE I

Obstruction of Court Orders

SEC. 101. Chapter 73 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

"§1509. Obstruction of court orders

"Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of a court of the United States, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

"No injunctive or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime."

SEC. 102. The analysis of chapter 73 of such title is amended by adding at the end thereof the following:

"1509. Obstruction of court orders."

TITLE II

Flight to avoid prosecution for damaging or destroying any building or other real or personal

property and, illegal transportation, use or possession of explosives; and, threats or false information concerning attempts to damage or destroy real or personal property by fire or explosives.

SEC. 201. Chapter 49 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

"§1074. Flight to avoid prosecution for damaging or destroying any building or other real or personal property.

"(a) Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody, or confinement after conviction, under the laws of the place from which he flees, for willfully attempting to or damaging or destroying by fire or explosive any building, structure, facility, vehicle, dwelling house, synagogue, church, religious center or educational institution, public or private, or (2) to avoid giving testimony in any criminal proceeding relating to any such offense shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

"(b) Violations of this section may be prosecuted in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement: Provided, however, That this section shall not be construed as indicating an intent on the part of Congress to prevent any State, Territory, Commonwealth, or possession of the United States of any jurisdiction over any offense over which they would have jurisdiction in the absence of such section."

SEC. 202. The analysis of chapter 49 of such title is amended by adding thereto the following:

"1074. Flight to avoid prosecution for damaging or destroying any building or other real or personal property."

SEC. 203. Chapter 39 of title 18 of the United States Code is amended by adding at the end thereof the following new section:

"§837. Explosives: illegal use or possession: and threats or false information concerning attempts to damage or destroy real or personal property by fire or explosives.

"(a) As used in this section—

"'commerce' means commerce between any state, territory, Commonwealth, district or possession of the United States, and any place outside thereof; or between points within the same state, territory or possession or the District of Columbia, but through any place outside thereof; or within any territory or possession of the United States or the District of Columbia;

"'explosive' means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators and other detonating agents, smokeless powders and any chemical compounds or mechanical mixture that contains any oxidizing and combustible units or other ingredients, in such proportions, quantities or packing that ignition by fire, by friction, by concussion, by percussion or by detonation of the compound or mixture or any part thereof may cause an explosion.

"(b) Whoever transports or aids and abets another in transporting in interstate or foreign commerce any explosive, with the knowledge or intent that it will be used to damage or destroy any building or other real or personal property for the purpose of interfering with its use for educational, religious, charitable, residential, business or civic objectives or of intimidating any person pursuing such objectives, shall be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both; and if personal injury results shall be subject to imprisonment for not more than ten years or a fine of not more than \$10,000, or both; and if death results shall be subject to imprisonment for any term of years or for life, but the court may impose the death penalty if the jury so recommends.

"(c) The possession of an explosive in such a manner as to evince an intent to use or the use of, such explosive, to damage or destroy any

building or other real or personal property used for educational, religious, charitable, residential, business, or civic objectives or to intimidate any person pursuing such objectives, creates rebuttable presumptions that the explosive was transported in interstate or foreign commerce or caused to be transported in interstate or foreign commerce by the person so possessing or using it, or by a person aiding or abetting the person so possessing or using it, or by a person aiding or abetting the person so possessing or using it: Provided, however, That no person may be convicted under this section unless there is evidence independent of the presumptions that this section has been violated.

"(d) Whoever, through the use of the mail, telephone, telegraph, or other instrument of commerce, willfully imparts or conveys, or causes to be imparted or conveyed, any threat, or false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to damage or destroy any building or other real or personal property for the purpose of interfering with its use for educational, religious, charitable, residential, business, or civic objectives, or of intimidating any person pursuing such objectives, shall be subject to imprisonment for not more than one year or a fine of not more than \$1,000, or both.

"(e) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, Territory, Commonwealth, or possession of the United States, and no law of any State, Territory, Commonwealth, or possession of the United States which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section."

Sec. 204. The analysis of chapter 39 of title 18 is amended by adding thereto the following:

"837. Explosives; illegal use or possession; and threats or false information concerning attempts to damage or destroy real or personal property by fire or explosives."

TITLE III

Federal Election Records

SEC. 301. Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or pri-

mary election of which candidates for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

SEC. 302. Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 301 to be retained and preserved shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

SEC. 303. Any record or paper required by section 301 to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

SEC. 304. Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

SEC. 305. The United States District Court for the district in which a demand is made pursuant to section 303, or in which a record or paper so demanded is located, shall have juris-

diction by appropriate process to compel the production of such record or paper.

SEC. 306. As used in this title, the term "officer of election" means any person who, under color of any Federal, State Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

TITLE IV

Extension of Powers of the Civil Rights Commission

SEC. 401. Section 105 of the Civil Rights Act of 1957 (42 U.S.C. Supp. V 1975d) (71 Stat. 635) is amended by adding the following new subsection at the end thereof:

"(h) Without limiting the generality of the foregoing, each member of the Commission shall have the power and authority to administer oaths or take statements of witnesses under affirmation."

TITLE V

Education of Children of Members of Armed Forces

SEC. 501. (a) Subsection (a) of section 6 of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), as amended, relating to arrangements for the provision of free public education for children residing on Federal property where local educational agencies are unable to provide such education, is amended by inserting after the first sentence the following new sentence: "Such arrangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority and it is the judgment of the Commissioner, after he has consulted with the appropriate State educational agency, that no local educational agency is able

to provide suitable free public education for such children."

(b) (1) The first sentence of subsection (d) of such section 6 is amended by adding before the period at the end thereof: "or, in the case of children to whom the second sentence of subsection (a) applies, with the head of any Federal department or agency having jurisdiction over the parents of some or all of such children."

(2) The second sentence of such subsection (d) is amended by striking out "Arrangements" and inserting in lieu thereof "Except where the Commissioner makes arrangements pursuant to the second sentence of subsection (a), arrangements."

SEC. 502. Section 10 of the Act of Sept. 23, 1950 (Public Law 815, Eighty-first Congress), as amended, relating to arrangements for facilities for the provision of free public education for children residing on Federal property where local educational agencies are unable to provide such education, is amended by inserting after the first sentence the following new sentence: "Such arrangements may also be made to provide, on a temporary basis, minimum school facilities for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority and it is the judgment of the Commissioner, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children."

TITLE VI

SEC. 601. That section 2004 of the Revised Statutes (42 U.S.C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), is amended as follows:

(a) Add the following as subsection (e) and designate the present subsection (e) as subsection "(f)":

"In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard, make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court

finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

"Notwithstanding any inconsistent provision of state law or the action of any state officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at any appropriate election shall constitute contempt of court.

"An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

"The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by Revised Statutes, section 1757; (5 U.S.C. 16) to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding be-

fore a voting referee, the applicant shall be heard *ex parte* at such times and places as the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

"Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

"The court, or at its discretion the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

"Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53 (c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed

by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

"Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally. Provided, however, that such applicant shall be qualified to vote under state law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

"When used in the subsection, the word 'vote' includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words 'affected area' shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a); and the words 'qualified under State law' shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist."

(b) Add the following sentence at the end of subsection (c):

"Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a),

the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State."

TITLE VII

Separability

SEC. 701. If any provision of this Act is held invalid, the remainder of this Act shall not be affected thereby.

EMPLOYMENT

Fair Employment Laws—California

Chapter 121 of the Acts of the 1959 California legislature, approved by the governor April 16, 1959, declares: "The opportunity to seek, obtain and hold employment without discrimination . . . is hereby recognized . . . to be a civil right." A State Commission on Fair Employment is established by the Act, and its duties and powers defined.

AN ACT to add Part 4.5 (commencing with Section 1410) to Division 2 of, and to amend Section 56 of, the Labor Code, relating to prevention and elimination of practices of discrimination in employment and otherwise against persons because of race, religious creed, color, national origin, or ancestry, creating a State Commission on Fair Employment Practices, defining its functions, powers and duties, providing for the appointment and compensation of its officers and employees.

The people of the State of California do enact as follows:

SECTION 1. Part 4.5 (commencing with Section 1410) is added to Division 2 of the Labor Code, to read:

PART 4.5 FAIR EMPLOYMENT PRACTICES

1410. This part may be referred to as the "California Fair Employment Practice Act."

1411. It is hereby declared as the public policy of this State that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, or ancestry.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons,

foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general.

This part shall be deemed an exercise of the police power of the State for the protection of the public welfare, prosperity, health, and peace of the people of the State of California.

1412. The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, or ancestry is hereby recognized as and declared to be a civil right.

1413. As used in this part:

(a) "Person" includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(b) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(c) "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment of other mutual aid or protection.

(d) "Employer," except as hereinafter provided, includes any person regularly em-

playing five or more persons, or any person acting as an agent of an employer, directly or indirectly; the State or any political or civil subdivision thereof and cities.

"Employer" does not include a social club, fraternal, charitable, educational or religious association or corporation not organized for private profit.

"Employer" does not include a person with respect to the person's employment of agricultural workers residing on the land where they are employed as farm workers.

(e) "Employee" does not include any individual employed by his parents, spouse or child, or in the domestic service of any person in his home; and it does not include agricultural workers residing on the land where they are employed as farm workers.

(f) "Commission," unless a different meaning clearly appears from the context, means the State Fair Employment Practice Commission created by this part.

1414. There is in the Division of Fair Employment Practices the State Fair Employment Practice Commission. Such commission shall consist of five members, to be known as commissioners, who shall be appointed by the Governor, by and with the advice and consent of the Senate, and one of whom shall be designated as chairman by the Governor. The term of office of each member of the commission shall be for four years; provided, however, that of the commissioners first appointed two shall be appointed for a term of one year, one for a term of two years, one for a term of three years, and one for a term of four years.

1415. Any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed. Three members of the commission shall constitute a quorum for the purpose of conducting the business thereof.

The Governor shall also appoint a Chief of the Division of Fair Employment Practices, who shall be the principal executive officer of the commission.

1416. Each member of the commission shall serve without compensation but shall receive fifty dollars (\$50) for each day actually spent in the performance of his duties under this part and shall also be entitled to his expenses actu-

ally and necessarily incurred by him in the performance of his duties.

1417. Any member of the commission may be removed by the Governor for inefficiency, for neglect of duty, misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard thereon.

1418. The commission shall formulate policies to effectuate the purposes of this part and may make recommendations to agencies and officers of the state and local governments in aid of such policies and purposes.

1419. The commission shall have the following functions, powers and duties:

(a) To establish and maintain a principal office and such other offices within the State as the Legislature authorizes.

(b) To meet and function at any place within the State.

(c) To appoint an attorney, and such clerks and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies.

(e) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this part.

(f) To receive, investigate and pass upon complaints alleging discrimination in employment because of race, religious creed, color, national origin or ancestry.

(g) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.

(h) To create such advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination because of race, religious creed, color, national origin, or ancestry, and to foster through community effort or otherwise good will, cooperation, and conciliation

among the groups and elements of the population of the State and to make recommendations to the commission for the development of policies and procedures in general. Such advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay.

(i) To issue such publications and such results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, religious creed, color, national origin, or ancestry.

(j) To render annually to the Governor and biennially to the Legislature a written report of its activities and of its recommendations.

1420. It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, or ancestry of any person, to refuse to hire or employ him or to bar or to discharge from employment such person, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

(b) For a labor organization, because of the race, religious creed, color, national origin, or ancestry of any person, to exclude, expel or restrict from its membership such person, or to provide only second-class or segregated membership or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religious creed, color, national origin, or ancestry or any intent to make any such limitation, specification or discrimination.

(d) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any

person because he has opposed any practices forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this part.

(e) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

1421. The commission is empowered to prevent unlawful employment practices. When it shall appear to it that an unlawful employment practice may have been committed, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner determines after such investigation that further action is warranted, he shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors.

Every member of the commission or its staff who discloses information in violation of the requirements of this section is guilty of a misdemeanor. Such disclosure by an employee subject to civil service shall be cause for disciplinary action under the State Civil Service Act.

1422. Any person claiming to be aggrieved by an alleged unlawful employment practice may file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The Attorney General may, in like manner, make, sign and file such complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to co-operate with the provisions of this part may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful employment practice or refusal to co-operate occurred; except that this period may be extended for not to exceed 90 days following the expiration of that year, if a

person allegedly aggrieved by an unlawful employment practice first obtained knowledge of the facts of the alleged unlawful employment practice after the expiration of one year from the date of their occurrence.

1423. After the filing of any accusation, an investigation shall be made and an attempt to eliminate such practice shall be made as provided in Section 1421 unless such attempt has previously been made.

In case of failure to eliminate such practice, or in advance thereof if in the judgment of the commissioner making the investigation, circumstances warrant, the latter shall cause to be issued and served in the name of the commission, a written accusation, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such accusation, hereinafter referred to as "respondent," to answer the charges of such accusation at a hearing.

1424. Hearings held under the provision of this part shall be conducted, as nearly as practicable, in accordance with the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1, Division 3, Title 2 of the Government Code, and the commission shall have all the powers granted therein.

1425. The case in support of the accusation shall be presented before the commission by one of its attorneys or agents, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence.

1426. If the commission finds that a respondent has engaged in any unlawful employment practice as defined in this part, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes

of this part, and including a requirement for report of the manner of compliance. If the commission finds that a respondent has not engaged in any such unlawful employment practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said accusation as to such respondent. A copy of its order shall be delivered in all cases to the Attorney General, and such other public officers as the commission deems proper.

Any order issued by the commission shall have printed on its face references to the provisions of the Administrative Procedure Act which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse.

1427. The commission shall establish rules of practice not inconsistent with law to govern the foregoing procedure and its own actions thereunder.

1428. Every final order or decision of the commission is subject to judicial review in accordance with law.

1429. Whenever the commission believes, on the basis of evidence presented to it, that any person is violating or is about to violate any final order or decision issued by it pursuant to this part, the commission may bring an action in the Superior Court of the State of California against such person to enjoin him from continuing the violation or engaging therein or in doing anything in furtherance thereof. In each action an order or judgment may be entered awarding such temporary restraining order or such preliminary or final injunction as may be proper.

1430. Any person who shall willfully resist, prevent, impede or interfere with any member of the commission or any of its agents or agencies in the performance of duties pursuant to this part, or who shall in any manner willfully violate an order of the commission, shall be guilty of a misdemeanor, punishable by imprisonment in a county jail, not exceeding six (6) months, or by a fine not exceeding five hundred dollars (\$500), or both.

1431. The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this act shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other

law of this State relating to discrimination because of race, religious creed, color, national origin or ancestry.

Nothing contained in this act shall be deemed to repeal or affect the provisions of any ordinance relating to such discrimination in effect in any city, city and county, or county at the time this act becomes effective, insofar as proceedings theretofore commenced under such ordinance or ordinances remain pending and undetermined. The respective administrative bodies then vested with the power and authority to enforce such ordinance or ordinances shall continue to have such power and authority, with no ouster or impairment of jurisdiction, until such pending proceedings are completed, but in no event beyond one year after the effective date of this act.

1432. If any clause, sentence, paragraph, or part of this part or the application thereof to any person or circumstance, shall, for any reason, be adjudged by a court of competent jurisdic-

tion to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this part and the application thereof to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved.

Sec. 2. Section 56 of said code is amended, to read:

56. The work of the department shall be divided into at least nine divisions known as the Division of Industrial Accidents, the Division of Industrial Safety, the Division of Housing, the Division of Labor Law Enforcement, the Division of Fair Employment Practices, the Division of Industrial Welfare, the Division of Labor Statistics and Research, the Division of Apprenticeship Standards and the State Compensation Insurance Fund.

EMPLOYMENT

Fair Employment Laws—New Mexico

Chapter 296 of the 1959 Acts of the New Mexico legislature, approved April 2, 1959, makes it unlawful for an employer or labor union to discriminate because of race, color, religious creed, national origin, or ancestry in hiring, firing, or conditions of employment.

CHAPTER 296

An Act to Amend Section 59-4-4 of the New Mexico Statutes Annotated, 1953 Compilation (Being Laws 1949, Chapter 161, Section 4); and to Provide Penalties for the Violation of the Equal Employment Opportunities Act.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. Section 59-4-4 of the New Mexico Statutes Annotated, 1953 Compilation (being Laws 1949, Chapter 161, Section 4) is hereby amended to read as follows:

"59-4-4. UNLAWFUL EMPLOYMENT PRACTICES.—It shall be unlawful employment practice:

A. for an employer, by himself or his agent,

because of the race, color, religious creed, national origin or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

B. for a labor organization hereafter to directly or indirectly, by ritualistic practice, constitutional or by law prescription, by tacit agreement among its members, or otherwise, deny a person or persons membership in its organization by reason of his race, color or creed, or by regulations, practice or otherwise, deny to any of its members, by reason of race, color or creed, equal treatment with all other members in any designation of members to any employer for

employment, promotion or dismissal by such employer;

C. for any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment which expresses, directly or indirectly any limitation, specification or discrimination as to race, color, religious creed, national origin or ancestry or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin or ancestry, unless based upon a bona fide occupational qualification;

D. for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person be-

cause he has opposed any practices forbidden under Sections 59-4-1 to 59-4-14 or because he has filed a complaint, testified or assisted in any proceeding under Section 59-4-5;

E. for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so;

F. any person, firm, association or corporation who shall expend any public moneys in violation of any of the provisions of Sections 59-4-1 to 59-4-14 shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) or imprisoned for not more than ninety days in the county jail of the county wherein such violation may have occurred, or both such fine and imprisonment at the discretion of the court."

INSURANCE

Anti-Discrimination—New York

Chapter 18 of the Acts of the 1960 New York Assembly, approved February 12, 1960, forbids insurance companies to discriminate in writing insurance because of race, color, creed, or national origin.

AN ACT to amend the insurance law, in relation to discrimination in writing life insurance

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subsection three of section two hundred nine of the insurance law, as last amended by chapter six hundred sixty-five of the laws of nineteen hundred fifty-eight, is hereby amended to read as follows (Matter in italics is new; matter in brackets is old law to be omitted):

3. No life insurance company doing business in this state and no savings and insurance bank shall make any distinction or discrimination between *persons because of race, color, creed or national origin* [white persons and colored persons, wholly or partially of African descent], as to the premiums or rates charged for policies upon the lives of such persons, or in any other manner whatever; nor shall any such

company or any such savings and insurance bank demand or require a greater premium from [such colored] persons *because of race, color, creed or national origin* than is at that time required by such company or by such savings and insurance bank from [white] *other* persons of the same age, sex, general condition of health and prospect of longevity, nor shall any such company or any such savings and insurance bank make or require any rebate, diminution or discount upon the amount to be paid on such policy in case of the death of [such colored] persons insured *because of race, color, creed or national origin*, nor insert in the policy any condition, nor make any stipulation, whereby such person insured shall bind himself, or his heirs, executors, administrators or assigns, to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon [white] *other*

persons in similar cases; and any such stipulation or condition so made or inserted shall be void. No life insurance company doing business in this state and no savings and insurance bank shall reject any application for a policy of life insurance issued and sold by it, or refuse to issue such policy after appropriate application therefor, nor shall

any lower rate be fixed or discrimination be made by it in the fees or commissions of its agents for writing such a policy solely by reason of the [applicant being wholly or partially of African descent] *applicant's race, creed, color or national origin.*

§ 2. This act shall take effect immediately.

PUBLIC ACCOMMODATIONS Anti-Discrimination Act—Kansas City

Ordinance 24250, approved by the Kansas City, Missouri council January 15, 1960, amends that city's code to forbid discrimination because of race or color in the operation of any hotel, motel, or restaurant.

AN ORDINANCE amending chapter 39 of the revised ordinances of Kansas City, Missouri, 1956, entitled "Offenses Generally and Regulation of Certain Businesses," by enacting one new section to be added thereto to be known as section 39.261.

Be it ordained by the Council of Kansas City:

Section A. That Chapter 39 of the Revised Ordinances of Kansas City, Missouri, 1956, entitled "Offenses Generally and Regulation of Certain Businesses," is hereby amended by enacting one new section to be added thereto to be known as Section 39.261, said section to read as follows:

Section 39.261. (a) It shall be unlawful for any owner, operator or manager of any hotel, motel or restaurant in Kansas City, Missouri, which offers lodging or food to the public, or for any agent or employee of such owner or operator to refuse, withhold from or deny to any person, for any reason directly or indirectly relating to the race or color of such person, any of the accommodations, advantages, facilities or services of such hotel, motel or restaurant.

(b) The terms "hotel" and "motel," as used in this ordinance, shall include every establishment offering lodging to transient guests for compensation, and which is not a bona fide private club, but said terms shall not apply to any such establishment if the majority of occupants therein are permanent residents.

(c) The term "restaurant," as used in this ordinance, shall include every cafe, cafeteria, coffee shop, sandwich shop, snack bar, supper club, soda fountain, soft drink or ice cream parlor, luncheonette, or other similar establishment which offers food for purchase and consumption on the premises, and which is not a bona fide private club, but the term "restaurant" shall not apply to taverns and bars.

(d) There is hereby established a fair public accommodations committee, to be composed of three members of the commission on human relations, appointed by the Mayor for terms of one year. The committee shall receive and investigate, with assistance from the staff of the city counselor and the said commission, all complaints of alleged violations of this ordinance. The committee shall endeavor to adjust such complaints by education, persuasion, and conciliation between the parties affected. If these efforts fail to resolve the problem promptly, and no later than thirty days after receiving a complaint, the committee shall refer the complaint to the city counselor for appropriate action.

(e) Conviction of any violation of the provisions of this ordinance shall be deemed a misdemeanor punishable by a fine of not less than \$25 and not more than \$200 for each offense.

(f) This section shall neither add to nor detract from any civil remedies now available to persons subjected to racial discrimination in hotels, motels and restaurants.

PUBLIC ACCOMMODATIONS

Business Establishments—California

Chapter 1866 of the Act of the 1959 California Assembly, approved by the governor July 16, 1959, declares all citizens of the state to be entitled "to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever," and provides penalties for the denial of such services because of color, race, religion, ancestry, or national origin. For an interpretation of the scope of this act, see 5 Race Rel. L. Rep. 255, *infra*.

AN ACT to amend Sections 51 and 52 of, and to repeal Sections 53 and 54 of, the Civil Code, relating to civil rights.

The people of the State of California do enact as follows:

SECTION 1. Section 51 of the Civil Code is amended to read:

51. This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a citizen which is conditioned or limited by law or which is applicable alike to citizens of every color, race, religion, ancestry, or national origin.

SEC. 2. Section 52 of said code is amended to read:

52. Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars (\$250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

SEC. 3. Sections 53 and 54 of said code are repealed.

SEC. 4. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

PUBLIC ACCOMMODATIONS

Definition—Illinois

House Bill 485 of the 1959 Illinois General Assembly, approved by the governor July 15, 1959, extends the definition of "public accommodation" in an 1885 statute prohibiting discrimination.

AN ACT to amend Section 1 of "An Act to protect all citizens in their civil and legal rights and fixing a penalty for violation of the same", approved June 10, 1885, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Section 1 of "An Act to protect all citizens in their civil and legal rights and

fixing a penalty for violation of the same", approved June 10, 1885, as amended, is amended to read as follows:

Sec. 1 All persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities and privileges of inns, restaurants, eating houses, hotels, soda fountains, soft drink parlors,

taverns, roadhouses, barber shops, department stores, clothing stores, hat stores, shoe stores, bathrooms, restrooms, theaters, skating rinks, public golf courses, public golf driving ranges, concerts, cafes, bicycle rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, busses, stages, aeroplanes, street cars, boats, funeral hearses, crematories and public conveyances on land, water

or air, and all other places of public accommodations and amusement, subject only to the conditions and limitations established by laws and applicable alike to all citizens; nor shall there be any discrimination on account of race or color in the price to be charged and paid for lots or graves in any cemetery or place for burying the dead.

HOUSING

Publicly-Assisted Housing—California

Chapter 1681 of the Acts of the 1959 California legislature, approved by the governor July 8, 1959, makes it illegal for the owners of publicly-assisted housing to refuse to sell or lease such property, or offer it on different terms, to prospective buyers or lessees because of race, color, religion, national origin, or ancestry. The Act also forbids inquiry by the seller or lessor to determine the race, color, religion, national origin, or ancestry of a prospective buyer or lessee.

An act to add Part 5 (commencing at Section 35700) to Division 24 of the Health and Safety Code, relating to discrimination in publicly assisted housing.

The people of the State of California do enact as follows:

Section 1. Part 5 (commencing at Section 35700) is added to Division 24 of the Health and Safety Code, to read:

PART 5. DISCRIMINATION IN PUBLICLY ASSISTED HOUSING

CHAPTER 1. FINDINGS AND DECLARATION OF POLICY

35700. This part shall be deemed an exercise of the police power of the State for the protection of the welfare, health and peace of the people of this State and the fulfillment and enforcement of the provisions of the Constitution of this State concerning civil rights.

The practice of discrimination because of race, color, religion, national origin or ancestry in any publicly assisted housing accommodations is hereby declared to be against public policy.

CHAPTER 2. DEFINITIONS

35710. When used in this part:

1. The term "person" includes one or more

individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy and receivers or other fiduciaries.

2. The term "housing accommodation" includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings, but shall not include any accommodations operated by a religious, fraternal, or charitable association or corporation not organized or operated for private profit; provided, that such accommodations are being used in furtherance of the primary purpose or purposes for which the association or corporation was formed.

3. The term "publicly assisted housing accommodation" includes any housing accommodation within the State:

(a) Which at the time of any alleged unlawful discrimination under Section 35720 is granted exemption in whole or in part from taxes levied by the State or any of its political subdivisions; provided, that nothing herein contained shall apply to any housing accommodations solely because the owner thereof enjoys any type of tax exemption by virtue of his veteran status.

(b) Which is constructed on land sold below cost by the State or any of its political subdivisions or any agency thereof, pursuant to the Federal Housing Act of 1949.

(c) Which is constructed in whole or in part on property acquired or assembled by the State or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction; provided, that nothing herein contained shall apply to any housing accommodation constructed in whole or in part on any property acquired by the Department of Veteran Affairs under the Veterans' Farm and Home Purchase Act of 1943.

(d) Which is located in a multiple dwelling and the acquisition, construction, rehabilitation, repair or maintenance of which is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof, or the State or any of its political subdivisions or any agency thereof.

(e) Which is offered for sale by a person who owns or otherwise controls the sale of five or more housing accommodations located on land that is contiguous (exclusive of public streets), if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof, or the State or any of its political subdivisions or any agency thereof, or (2) a commitment, issued by a government agency is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof, or the State or any of its political subdivisions or any agency thereof.

4. The term "owner" includes the lessee, sublessee, assignee, managing agent, or other person having the right of ownership or possession or the right to rent or lease housing accommodations and includes the State and any of its political subdivisions and any agency thereof.

5. The term "discriminate" includes to segregate or separate.

6. The term "multiple dwelling" means a dwelling which is occupied, as a rule, for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include

a hospital, convent, monastery, public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family" means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

CHAPTER 3. DISCRIMINATION PROHIBITED

35720. It shall be unlawful:

1. For the owner of any publicly assisted housing accommodation with knowledge of such assistance to refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodation because of the race, color, religion, national origin, or ancestry of such person or persons.

2. For the owner of any publicly assisted housing accommodation with knowledge of such assistance to discriminate against any person because of the race, color, religion, national origin or ancestry of such person in the terms, conditions or privileges of any publicly assisted housing accommodations or in the furnishing of facilities or services in connection therewith.

3. For any owner of any publicly assisted housing accommodation with knowledge of such assistance to make or to cause to be made any written or oral inquiry concerning the race, color, religion, national origin or ancestry of a person seeking to purchase, rent or lease any publicly assisted housing accommodation for the purpose of violating any of the provisions of this part.

CHAPTER 4. ENFORCEMENT

35730. Any person aggrieved by a violation of this part shall have a right of action in any court of appropriate jurisdiction for restraint of such violation and for other equitable remedies including such affirmative relief as may be necessary to undo the effects of such violation.

Any person aggrieved by a violation of this part shall in addition have a right of action in any court of appropriate jurisdiction for damages caused by such violation in a sum of not less than five hundred dollars (\$500).

CHAPTER 5. APPLICABILITY

35740. The provisions of this part shall not apply to privately owned housing accommoda-

tions which are not publicly assisted within the meaning of this part.

35741. Nothing in this part shall be construed to affect the title or other interest of a person who purchases, leases, or takes an encumbrance on a publicly assisted housing accommodation in good faith and without knowledge that the owner or lessor of the property has violated any provision of this part.

URBAN RENEWAL Anti-Discrimination—California

Chapter 1102 of the Acts of the 1959 California legislature, approved by the governor June 16, 1959, prescribes procedures for the initiation and execution of urban redevelopment projects. Among the requirements: property owners in the area must be given an opportunity to participate in the redevelopment, and the project must proceed without discrimination because of race, color, religion, national origin, or ancestry. Part of the act follows:

SEC. 23. Section 33049 is added to said code, to read:

33049. It is hereby declared to be the policy of the State that in undertaking community redevelopment or urban renewal projects under this part (commencing at Section 33000) there shall be no discrimination because of race, color, religion, national origin, or ancestry.

SEC. 24. This act shall be applicable to redevelopment plans or projects and urban renewal plans or projects commenced after its effective date, and to such plans or projects commenced prior to its effective date on which no agency hearing has been held.

ATTORNEYS GENERAL

HOUSING Real Estate Agents—Massachusetts

The Attorney General of Massachusetts has construed that state's Public Accommodation statute to preclude racial discrimination by real estate agents in accepting bookings, etc., even though the property involved was not of a type specifically mentioned in that state's "Fair Housing" law. (2 Race Rel. L. Rep. 1155, 4 Race Rel. L. Rep. 453).

November 24, 1959

Mrs. Mildred H. Mahoney, Chairman
Commission Against Discrimination
41 Tremont Street
Boston 8, Massachusetts

Dear Mrs. Mahoney:

You indicate that the Commission Against Discrimination has before it affidavits filed against two real estate agencies alleging discrimination because of color. One affidavit concerns the rental of an apartment in a two-family house owned and managed by a real estate agency which manages and owns a large number of such properties throughout the commonwealth. Because, however, the house in question is not contiguous to eight other rental units controlled by the respondent, it is not covered by the recently enacted "fair housing law." (C 239 of the Acts of 1959)

The second affidavit was filed by the owner of a single family dwelling. He alleges that a real estate agency refused to show his house to prospective Negro buyers.

You further indicate that your Commission anticipates that it will continue to receive affidavits alleging discriminatory practices by real estate agencies regarding properties not covered by the housing amendment to the Fair Housing Practices Law.

You request, therefore, my opinion on the following question:

"Would the Commission in accepting jurisdiction under the Public Accommodations Law of complaints filed against real estate agencies which allege discrimination because of religion, color, or race, be abusing

its discretion or acting arbitrarily or capriciously or otherwise not in accordance with law?"

Under G.L.C.151B, as amended, the Commission Against Discrimination is vested with jurisdiction of the "Public Accommodations Law" so-called. That law is found in G.L. C.272, ss. 92A and 98.

Section 92A reads:

Places of Accommodation or Resort Not to Discriminate Because of Sect, Creed, Class, Race, Color or Nationality.

No owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort, or amusement shall, directly or indirectly, by himself or another, publish, issue, circulate, distribute or display, or cause to be published, issued, circulated, distributed or displayed, in any way, any advertisement, circular, folder, book, pamphlet, written, or painted, or printed notice or sign, of any kind or description, intended to discriminate against or actually discriminating against persons of any religious sect, creed, class, race, color, denomination or nationality, in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such places of public accommodation, resort or amusement; provided, that nothing herein contained shall be construed to prohibit the mailing to any person of a private communication in writing, in response to his specific written inquiry.

A place of public accommodation, resort

or amusement within the meaning hereof shall be defined as an shall be deemed to include any place, whether licensed or unlicensed, *which is open to and accepts or solicits the patronage of the general public*, and, without limiting the generality of this definition, whether or not it be (1) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest; (2) a carrier, conveyance, or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto; (3) a gas station, garage, retail store or *establishment, including those dispensing personal services*; (4) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises; (5) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool; (6) a boardwalk or other public highway; (7) an auditorium, theater, music hall, meeting place or hall, including the common halls of buildings; (8) a place of public amusement, recreation, sport, exercise or entertainment; (9) a public library, museum or planetarium; or (10) a hospital, dispensary or clinic operating for profit; provided, however, that no place shall be deemed to be a place of public accommodation, resort or amusement which is owned or operated by a club or institution whose products or facilities or services are available only to its members and their guests nor by any religious, racial or denominational institution or organization, nor by any organization operated for charitable or educational purposes.

Any person who shall violate any provision of this section, or who shall aid in or incite, cause or bring about, in whole or in part, such a violation shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than thirty days or both. (1933, 117; 1953, 437, appvd. June 2, 1953; effective 90 days thereafter.) (Emphasis Supplied)

Section 98 reads:

Religion, Color or Race Discrimination Penalized.

Whoever makes any distinction, discrimination or restriction on account of religion, color or race, except for good cause applicable alike to all persons of every religion, color and race, relative to the admission of any person to, or his treatment in, any place of public accommodation, resort or amusement, as defined in section ninety-two A of chapter two hundred and seventy-two, or whoever aids or incites such distinction, discrimination or restriction, shall be punished by a fine of not more than three hundred dollars or by imprisonment for not more than one year, or both, and shall forfeit to any person aggrieved thereby not less than one hundred nor more than five hundred dollars; but such person so aggrieved shall not recover against more than one person by reason of any one act of distinction, discrimination or restriction. All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. This right is recognized and declared to be a civil right.

Although to date 24 states have enacted Public Accommodations Laws similar in their scope to the Massachusetts laws, inquiry and research have uncovered no decided court cases bearing on the issue herein posed. However, the Connecticut Commission on Civil Rights, on December 15, 1955, ruled that under its interpretation of the Connecticut Public Accommodations statute a real estate agent is covered under the definition of a place of public accommodation as "an establishment which caters or offers its services or facilities or goods to the general public" within the meaning of that law.

It is significant that in the four years that have elapsed since the promulgation of the Connecticut ruling there has been no challenge to it in that State.

Obviously, a real estate agency is a "... place which is open to and accepts or solicits the patronage of the general public ..." and it may well be that a real estate agency is an "establishment" in the business of "dispensing personal services." Finally, a real estate agency does not come within the clearly defined exceptions of a private club or a religious, racial, denominational, charitable or educational use set out in the Massachusetts statute.

In view of the wording of our Public Accommodations statute, both standing alone and in the context of the broad and long-standing public policy established by the Mass. General Court to prohibit racial, religious and ethnic national discrimination, it would seem, and I so rule, that it is a violation for a real estate agency

to refuse to offer its services to any person or to refuse to accommodate any person as a client because of his race, creed or color.

Very truly yours,

Edward J. McCormack, Jr.
Attorney General

PUBLIC ACCOMMODATIONS Real Estate Agents—California

The Attorney General of California has construed the California Civil Rights Act as amended (5 Race Rel. L. Rep. 249, *supra*) as applying to the advantages, facilities, privileges and services supplied by real estate brokers and real estate salesmen in regard to the selling, transferring, renting, leasing, or rental managing of real property. Also, he ruled, the act still applies to inns, restaurants, hotels, eating houses, etc.

The HONORABLE JOHN A. O'CONNELL, Assemblyman of the Twenty-third Assembly District, has requested the opinion of this office on the following questions:

1. Do the provisions of Civil Code section 51 (Unruh Civil Rights Act) as amended in the 1959 session of the Legislature still apply to inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances, and other places of public accommodation or amusement?

2. Do the provisions of Civil Code section 51 apply to the advantages, facilities, privileges, and services supplied by real estate brokers and real estate salesmen in regard to the selling, transferring, renting, leasing, or rental managing of real property?

The conclusions may be summarized as follows:

1. The provisions of Civil Code section 51 (Unruh Civil Rights Act) as amended in the 1959 session of the Legislature still apply to inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances,

and other places of public accommodation or amusement.

2. The provisions of Civil Code section 51 apply to the advantages, facilities, privileges, and services supplied by real estate brokers and real estate salesmen in regard to the selling, transferring, renting, leasing, or rental managing of real property.

ANALYSIS

In 1959 section 51 of the Civil Code was amended for the first time since 1923 (See Calif. Stats. 1959, Ch. 1866). Prior to the 1959 amendment section 51 read:

"All citizens within the jurisdiction of this State are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens."

Section 51 now reads:

"This section shall be known, and may be cited, as the Unruh Civil Rights Act.

"All citizens within the jurisdiction of this State are free and equal, and no matter

what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

"This section shall not be construed to confer any right or privilege on a citizen which is conditioned or limited by law or which is applicable alike to citizens of every color, race, religion, ancestry, or national origin."

The first question is whether the entities specifically listed in section 51 prior to the 1959 amendment are included in the term "... all business establishments of every kind whatsoever." The conclusion is that they are. The language used in the 1959 amendment shows an intent to broaden the application of section 51 to cover not only the entities listed in that section prior to 1959 but also to include all other business enterprises. The Legislature was doubly emphatic since it was not satisfied to use only the word "all" in referring to business establishments, but also added the phrase "of every kind whatsoever."

Certainly the entities listed in section 51 prior to September, 1959, are businesses. The term "establishments" does not in any way restrict the application of the section to particular types of business. Therefore, the phrase "Business establishments" as used in section 51 as it now exists includes any and all business organizations, entities, or enterprises in this State.

The second question is concerned with whether section 51 applies to real estate brokers and salesmen. The conclusion is that section 51 requires all citizens regardless of race, color, religion, ancestry or national origin be given the full and equal accommodations, advantages, privileges, and services supplied by real estate brokers and salesmen in regard to selling, transferring, renting, or rental managing.

A definition of "business" has been set forth in *Mansfield v. Hyde*, 112 Cal. App. 2d 133, 137-138:

"'Business' in its broad sense embraces everything about which one can be employed; the word is often synonymous with calling, occupation, or trade, engaged in for the purpose of obtaining a livelihood or profit or gain. (*Marin Municipal Water Dist. v. Chenu*, 188 Cal. 734, 738)."

There is no doubt but that real estate brokers

and salesmen engage in business within that broad definition.

In addition, throughout the country the cases have specifically held real estate activities to be "business." (*Lavan v. Menaker*, 124 Atl. 743, 744 (Pa., 1924); *Boomhower v. U. S.*, 74 F.Supp. 997, 1007-1008 (D. C., Ia., 1947); *Kirtland v. Corbett*, 230 S.W. 27, 30 (Tenn., 1921); *Davis v. Darling*, 30 N.Y.S. 321, 322 (N.Y., 1894); *Manker v. Tough*, 98 P. 792 (Kan., 1908); *Bennett v. Hebbard*, 68 Atl. 537 (N.H., 1907)).

In *Lavan v. Menaker*, 124 Atl. 743, 744 (Pa., 1924), where lots were sold subject to restriction that none should be used for business purposes the court stated:

"The trial court properly found that conducting a general real estate office was a business within the restriction in the deed, ..."

Real estate activities have also been considered "business" in the California cases (*Shaffer v. Beinhorn*, 190 Cal. 569 (1923); *Haas v. Greenwald*, 196 Cal. 236 (1925)).

However, the conclusive consideration is the fact that the California Legislature has declared real estate brokers and salesmen to be engaging in business when they carry on their activities. In licensing real estate brokers and salesmen in California, the Legislature in the Business and Professions Code uses the word "business" in several sections as follows:

Section 10059.

"The commission may:

"(c) Make such recommendations and suggestions of policy to the commissioner as the commission deems beneficial and proper for the welfare and progress of the real estate licensees and of the public and of the real estate business in California." (Emphasis added.)

Section 10130.

"It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this State without first obtaining a real estate license from the division." (Emphasis added.)

Section 10150.6.

"The Real Estate Commissioner shall not grant an original real estate broker's license

to any person who has not held a real estate salesman's license for at least two years prior to the date of his application for the broker's license, and during such time was not actively engaged in the *business* of real estate salesman. . . ." (Emphasis added.)

Section 10162.

"Every licensed real estate broker shall have and maintain a definite place of *business* in the State of California which shall serve as his office for the transaction of *business*. This office shall be the place where his license is displayed and where personal consultations with clients are held.

"No real estate license authorizes the licensee to do *business* except from the location stipulated in the real estate license.

"Notice in writing shall be given the commissioner of change of *business* location of a real estate broker, whereupon the commissioner shall issue a new license for the unexpired period." (Emphasis added.)

Section 10163.

"If the applicant for a real estate broker's license maintains more than one place of

business within the State he shall apply for and procure an additional license for each branch office so maintained by him. Every such application shall state the name of the person and the location of the place or places of *business* for which such license is desired. The commissioner may determine whether or not a real estate broker is doing a real estate brokerage *business* at or from any particular location which requires him to have a branch office license." (Emphasis added.)

From these sections there is no doubt that real estate brokers and salesmen are engaged in "business" and that the Legislature in amending section 51 intended to include real estate brokers and salesmen within the term "business" as used in that section. It is, therefore, concluded that the provisions of Civil Code section 51 apply to the advantages, facilities, privileges, and services supplied by real estate brokers and real estate salesmen in regard to the selling, transferring, renting, leasing, or rental managing of real property.

PUBLIC FUNDS

Discriminatory organizations—Pennsylvania

The Attorney General of Pennsylvania has expressed the opinion that the Fourteenth Amendment prohibits the payment of state funds to institutions or organizations which discriminate on the basis of race, creed, or color. This prohibition applies, she ruled, regardless of the express charter provisions under which the organization or institution operates.

DEPARTMENT OF JUSTICE
Harrisburg, Pa.

Honorable Charles C. Smith
Auditor General
Harrisburg, Pennsylvania

Honorable Ruth Grigg Horting
Secretary of Public Welfare
Harrisburg, Pennsylvania

SIR AND MADAM:

You have requested our opinion with respect to the disbursement of public funds to an institution or organization which:

(a) Is founded upon covenants or conditions

which discriminate on account of race, creed, or color; or

(b) Conducts its affairs in such fashion as to discriminate on account of race, creed, or color.

An institution administered in such a manner as to discriminate or prefer on the basis of race, creed, or color, even though it has a constitution and by-laws which on their face are nondiscriminatory, must be judged according to its practice: *Rice v. Elmore*, 165 F.2d 387, cert. den. 333 U.S. 875. Thus, situations (a) and (b) as set forth in your inquiry are subject to the same legal and constitutional conclusions.

Disbursement of public funds may be either (1) in compliance with a direct appropriation of the General Assembly to designated insti-

tutions, or (2) in conformity with a general Act of Assembly permitting payments by the executive branch of the government to institutions or agencies engaged in certain named activities such as mental health and guidance clinics. This opinion does not embrace the legality of appropriations or payments made on a per diem or cost-of-care basis for services rendered by institutions, a matter not within the purview of your requests.

The Fourteenth Amendment to the Constitution of the United States prohibits the states from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States. This provision applies to all acts of the states whether executive, legislative or judicial: *Virginia v. Rives*, 100 U.S. 313, Mo. v. Dockery, 191 U.S. 170, *Voigt v. Webb*, 47 F.Supp. 743 (D.C.E.D. Wash. 1942). Racial discrimination by the state or any agency thereof or any commission, board or institution deriving support from the state is prohibited under the Fourteenth Amendment.¹ Religious discrimination is equally prohibited.

[Effect of Public Funds]

The use of public funds by a private corporation or institution brings such institution within the ambit of the Fourteenth Amendment and hence racial or religious discrimination is prohibited: *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F.2d 212, cert. den. 326 U.S. 721 (1945); *Commonwealth v. Board of City*

1. Discrimination on the basis of race, creed or color in the employment of personnel is prohibited by State statute: Act of June 27, 1955, P. L. 744.

Trusts, 353 U.S. 230. Thus, whether the designation of the institution is made by the Legislature or some other official, it is clear that under the United States Constitution public funds may not be used for institutions or organizations which discriminate on the basis of race, creed or color.²

It is our opinion and you are accordingly advised that the Fourteenth Amendment to the Constitution of the United States prohibits the disbursement of public funds to any institution which:

(a) Is founded upon covenants or conditions which discriminate on account of race, creed, or color, or

(b) Conducts its affairs in such fashion as to discriminate on account of race, creed, or color.

This Opinion formalizes the written advice given you several months ago.

Very truly yours,
DEPARTMENT OF JUSTICE,
Lois G. Forer,
Deputy Attorney General.

Jerome H. Gerber,
Deputy Attorney General.

Anne X. Alpern,
Attorney General.

2. See also Pennsylvania Constitution, Art. III, Section 18, prohibiting appropriations in support of sectarian institutions. An institution which limits its benefits or gives preference to any particular religious sect would fall within this ban: *Collins v. Martin*, 302 Pa. 144, *Constitutional Defense League v. Waters*, 308 Pa. 150.

ADMINISTRATIVE AGENCIES

CORPORATIONS

Refusal to Charter—New York

On February 12, 1960, the New York Secretary of State refused to domesticate a District of Columbia corporation, the Association for the Preservation of Freedom of Choice, Inc., on the ground that it is a pro-segregation organization precluded from doing business in New York by the General Corporation and Membership Laws. A New York court's previous denial of the association's application for a certificate of incorporation in New York is found at 4 Race Rel. L. Rep. 690 (1959). The text of the statement by the Secretary of State is reproduced below.

Demand was made February 10th upon the Secretary of State, Mrs. Caroline K. Simon, to file a certificate intended to permit the Association for the Preservation of Freedom of Choice, Inc., a District of Columbia corporation, to do business in the State of New York.

Mrs. Simon refused to file the certificate, and rejected the demand because the applicant had not met the requirements of Section 212 (2) of the New York State General Corporation Law and Section 10 of the Membership Law.

Mrs. Simon said, "Section 212 (2) of the New York State General Corporation Law and Section 10 of the Membership Law is expressly intended to deny the right and the privilege of doing business in the State of New York to any hate-

group corporations. The Law of our State is not intended to aid or to abet anti-Americanism under beguiling fronts. The name Association for the Preservation of Freedom of Choice, Inc. could possibly serve to hide the fact that a District of Columbia corporation might actually be inclined to favor (in so-called scientific studies) what in South Africa is an abomination referred to as apartheid. There is no room in New York State for corporate groups who cannot meet the requirements of Section 212 (2) of the General Corporation Law and Section 10 of the Membership Law. I have therefore referred this matter with the affidavit and notice of motion thereafter served upon me to the office of the Attorney General.

EMPLOYMENT

Age Discrimination—New York

Conrad RAAB v. SYRACUSE TRANSIT CORPORATION.

New York State Commission Against Discrimination, April 8, 1960, CA-6064-59.

SUMMARY: A 53-year-old New Yorker sought employment with a bus company as a driver, but was told that only men between the ages of 25 and 50 were being hired. He filed a complaint with the State Commission Against Discrimination, alleging that the bus company had violated the New York law against Discrimination, which forbids refusal of employment because of age. The company contended that the job of bus driver was one which the law contemplated as an exception because "age is a bona fide factor in connection with job performance." The

investigating commissioner held that the employer acted reasonably in considering the job as one for which a maximum age should be fixed for initial hiring. However, the bus company agreed to reconsider the complainant's application since he had had previous job experience as a driver.

1. The Complaint

The complaint of Mr. Conrad Raab against the Syracuse Transit Corporation presents the Commission with a charge by complainant of refusal of employment because of age, and a claim by the employer-respondent that the maximum chronological age for initial employment which the employer-respondent now desires to set should be deemed valid under the bona fide occupational qualification provisions of the New York Law Against Discrimination and the Commission's interpretive rulings.

The job category in question is that of bus driver for the Syracuse Transit Corporation.

The maximum chronological age for initial employment set by the employer, Syracuse Rapid Transit Company, is age 50.

The complainant's version as to what transpired upon his application for a position is that he was asked his age and told the interviewer that he was 53. The interviewer allegedly stated:

"You are too old for the job, we are hiring only men between 25 and 50."

Complainant allegedly then advised the interviewer that there were people over 53 driving buses for the Syracuse Transit Corporation, was thereupon informed that such drivers were "old-timers" and, so far as initial employment was concerned, there was no job for him.

It appeared upon investigation that it had been the policy of the Syracuse Transit Corporation prior to the effective date of the "age" provisions of the New York Law Against Discrimination, July 1, 1958, to confine its employment of drivers to men between 25 and 50 years of age.

There is some indication that after the enactment of the "age" provisions of the law, the bus company considered a change in its policy and a shift to individual physical examination for each applicant regardless of age. It appears, however, that the bus company has adhered to its original policy with respect to age specifications. Under all the circumstances, the evidence warrants a finding of probable cause to credit the allegations of the complaint that the complainant was refused employment because of his age.

2. Claim of Bona Fide Occupational Qualification

The further issue is presented as to whether the particular fact situation is one of those instances in which age constitutes a bona fide occupational qualification.

Section 296.1(c) of the Law Against Discrimination provides the statutory authority for considering the issue of bona fide occupational qualification in connection with age; and Rule D of the Commission's rulings interpretive of the "age" provisions of the law provides the more detailed guides to interpretation of the statutory statement.

Rule D declares:

"The Law provides for 'a bona fide occupational qualification' in certain cases.

"1. Consideration may be given to age as a bona fide occupational qualification in such circumstances, among others, as the following:

"a. Where age is a bona fide factor in connection with job performance.

"b. Where age is a bona fide factor in an apprentice training or on-the-job training program of long duration.

"c. Where age is a bona fide factor in fulfilling the provisions of other statutes (e.g. laws regulating employment of minors and females).

"2. The Commission recognizes the necessity for giving employers a reasonable time in which to review their employment standards to determine those instances in which they believe that age constitutes a bona fide occupational qualification. At the same time, the rights of persons claiming to be aggrieved come into being upon the effective date of the Law, July 1, 1958.

"Accordingly, the Commission has established the following procedure:

"An employer may, at his option, file with the Commission a statement supported by the facts claiming the existence of a bona fide occupational qualification. When such statement is filed in good faith, the employer may put such bona fide occupational qualification into effect, with the

understanding that if, upon review of the employer's operation in practice, the Commission disagrees with the employer, it will offer the employer an opportunity to correct his practices."

The Syracuse Rapid Transit Corporation did invoke Rule D and raised the question of bona fide occupational qualification following the filing of the complaint and in the course of the Commission's investigation.

The fact that the respondent delayed until this point to make such application in lieu of exercising its privilege to do so prior to the filing of any complaint, necessitates the finding of probable cause noted above. It does not, however, preclude the respondent from now raising and seeking a determination of the bona fide occupational qualification issue and having such determination considered in relation to the facts of the instant complaint.

It may be noted at the outset that some of the medical and statistical data on the general subject of age as a factor in the selection of truck and bus drivers would support the argument that each individual applicant should be judged on his individual merits and tested against particular standards for the job in question without any assumptions based on chronological age. (*Job Placement and Adjustment for Older Workers*—McFarland and Philbrook, *Geriatrics*, V. 13, pp. 802-807, December, 1958; *An Aid to Accident Prevention*, Brandaleone and Friedman, *Industrial Medicine and Surgery*, 22:11, 520-524, November, 1953; *Human Factors in Highway Transport Safety*, Harvard School of Public Health, 1954, Chapter 7—age.) This, indeed, might be the ideal situation.

It appears, however, that the age provisions of the Law Against Discrimination were not drafted on this principle; and Rule D of the Commission's interpretive rulings, quoted above, recognizes and proceeds on the basis that there are instances in which chronological age may be used as a bona fide factor in setting employment standards.

It may further be noted that the existing "age" provision of the New York Civil Service Law, Section 54, and its predecessor, Section 25-a, also recognize chronological age as a factor for certain types of occupations. Such provision of the Civil Service Law suggests a useful approach for the manner in which the Commission may consider claims of bona fide occupational qualification in connection with the setting of a maximum

chronological age for initial employment. The approach may be summarized as one in which two questions are presented for determination. There is first the preliminary question as to the employer's action in considering the job category in question to be one for which *any* maximum age should be fixed for initial hiring by the particular employer. If the Commission's conclusion on the first question is that it was lawful for the employer to use a maximum entrance age (for example, because the employment, like that of a policeman, requires extraordinary physical effort), then the Commission must next direct its attention to and review, as a second question, the particular maximum age which the employer did fix for initial hiring. Thus, in the instant case, the claim for bona fide occupational qualification should be upheld if it is found that the employer was acting lawfully in considering the job of driver for the Syracuse Transit Corporation to be one for which a maximum age should be fixed for initial hiring, and that the maximum age the employer did fix, namely 50, was warranted under the facts of the employer's existing operation.

Upon considering the data gathered in the course of the investigation of the claim of age as a bona fide occupational qualification for the job category of bus driver, including a review of the employer's operations and a review of existing data and informed opinion; and after conferring with both the respondent and the complainant and giving each an opportunity to present such data as each desired, and giving due weight to the employer's judgment based on its experience and to the complainant's arguments, it is my determination:

that the employer is acting reasonably in considering the job of driver for the Syracuse Transit Corporation to be one for which a maximum age should be fixed for initial hiring; and that the maximum age the employer desires to fix for the particular job category, namely 50, should not be deemed to be a contravention of the age provisions of the New York Law Against Discrimination.

It is to be noted, specifically, that in making my disposition of the above claim I have followed the Commission's general policy with respect to claims of bona fide occupational qualification; namely, that the Commission will deal with each such claim on the basis of the particular facts involved.

This policy was reaffirmed by the Commission in connection with the "age" provisions of the Law Against Discrimination in connection with a request by the New York State Motorbus Association, Inc. that a blanket exemption as to "age" for drivers be granted to motorbus companies operating under certificates of public convenience and necessity issued by the Public Service Commission. In that instance the Commission repeated its view as to the desirability of particularized requests by individual employers. It should be added that the Commission sought and received the cooperation of the New York State Motorbus Association, Inc.; and that such cooperation has been continuing as indicated by the fact that the employer in the case before me referred in its claim of bona fide occupational qualification to the circumstance that the Association through its Executive Vice-President, had requested a blanket exemption; that it had been informed of the Commission's action on such request by the Association: namely, that the Commission would not accept a request for a bona fide occupational "exemption" from associations in behalf of the membership, but would confine its action to individual companies on the basis of particularized individual requests; and that it was proceeding upon such advice and information.

The Commission's position, as stated above, is herewith reaffirmed and applied by me, and my determination herein is confined to the job category of bus driver in the existing operations of the Syracuse Transit Corporation.

The maximum entrance age, 50, which the Syracuse Transit Corporation now desires to set for initial hiring of bus drivers for such operations comes within the bona fide occupational qualification provision of the law. So far as the minimum age, 25, is concerned, the Commission's Rule A notes that the Law does not apply to such *minimum* age specifications.

3. *Terms of Conciliation Under Facts of Instant Case.*

In the course of investigation and conference in connection with the instant complaint, the question was discussed with the respondent as to its position with respect to an applicant over 50 who could present prior bus driving experience in a comparable operation. The respondent indicated that it would give serious consideration to such an applicant despite his age, taking into

account, of course, the character of the prior experience and the ability of the applicant to meet the necessary physical tests and other job qualifications such as possession of the proper licenses.

The complainant in the instant case had asserted a degree of prior driving experience and there is some indication in the evidence that complainant was not given an adequate opportunity to present such experience for evaluation by the respondent.

Accordingly, it has been proposed by me, and accepted by the respondent, as a term of conciliation herein that the complainant will be invited to renew his application and to present his prior driving experience for evaluation by the respondent. The respondent will give the complainant 90 days from the day hereof within which to make such application, and respondent will advise me thereafter of its findings, the basis thereof, and its action upon the application.

s/ Mary Louise Nice
Investigating Commissioner

• • •

NOTICE is hereby given that the complainant has a right to apply to the Chairman for a reconsideration of the terms of conciliation herein in accordance with Rule 4 of the Commission's Rules which provides that such application must be in writing, state specifically the grounds upon which it is based and be filed within 15 days from the date of the mailing of this notice of disposition.

Note

The sources of inquiry for the data obtained and submitted for my consideration included the following:

New York State Public Service Commission
New York State Motor Vehicle Bureau
New York State Labor Department
Workmen's Compensation Board
New York University—Center for Safety Education
Flight Safety Foundation, Inc.
The National Committee on the Aging
The Safety Council, Inc. of Greater New York

Interstate Commerce Commission
American Trucking Association, Inc.
American Association of Motor Vehicle Administrators, Inc.

National Safety Council
National Bureau of Casualty Underwriters
Pennsylvania State University—Institute of Public Safety.

EMPLOYMENT

Airlines—New York

Patricia BANKS v. CAPITAL AIRLINES.

New York State Commission Against Discrimination, February 29, 1960. Complaint Case No. C-4542-57

SUMMARY: In 1957, a Negro woman filed a complaint, subsequently amended, charging that Capital Airlines had refused to employ her as a flight hostess solely because of her race. The chairman of the commission made an investigation and determined probable cause existed for the charge. After his efforts at conciliation failed, a hearing was ordered before three members of the commission. At that hearing the airline contended that the complaint had not been filed within the statutory time, and that New York law is not applicable to the case because the airline hired its hostesses in Washington, D. C., and not in New York. Both contentions were rejected by the commission, which ruled that the complaint was timely, and that the air school which trained the airline's hostesses operated in New York and was its agent. An order was entered directing the airline to employ the complainant, subject to the same conditions as white employees, and to refrain from discriminatory hiring practices in the future. [See also, 1 Race Rel. L. Rep. 1148 (1956)].

Statement of the Case

On February 1, 1957, Patricia Banks, a Negro (hereinafter "complainant") residing at 106-12 Pinegrove Street, Jamaica, Queens, New York, made, signed and filed with the New York State Commission Against Discrimination (hereinafter the "Commission"), a verified complaint charging Capital Airlines, Inc. (hereinafter "respondent") with unlawful discriminatory practices relating to employment in that respondent refused to hire complainant as a flight hostess because of her color and further that it is the policy of respondent not to employ Negroes as flight hostesses.

On November 3, 1958, in accordance with Section 297 of the Law Against Discrimination (Executive Law, Article 15, hereinafter "the Law"), complainant amended said complaint, charging respondent with the following:

"First: I charge that Capital Airlines, Inc. hereinafter referred to as the respondent, has committed and continues to commit unlawful discriminatory practices, under section 296.1(a) of the New York State Law Against Discrimination in that respondent has re-

fused and still refuses to hire or employ me as a flight hostess because of my color.

"Second: I further charge that respondent committed and continues to commit unlawful discriminatory practices, under section 296.1(a) of the New York State Law Against Discrimination in that respondent has maintained and still maintains a policy of barring Negroes from employment because of their color, in all flight capacities, including that of flight hostess."

The particulars of said charges are set forth in paragraphs 1 through 58 of said amended complaint.

Chairman Elmer A. Carter, the duly designated Investigating Commissioner, with the assistance of the Commission's staff, made an investigation of said complaint, as amended. He endeavored by conference, conciliation and persuasion to eliminate the unlawful discriminatory practices complained of but respondent failed to accede to his efforts and refused to eliminate said unlawful discriminatory practices.

Accordingly, on or about May 26, 1959, the

Investigating Commissioner pursuant to Section 297 of the Law, caused to be issued and served in the name of the Commission a notice of hearing, together with a copy of said complaint, as amended, requiring respondent to answer the charges of said complaint at a hearing before three Hearing Commissioners, sitting as the Commission, at a time and place specified in said notice.

On June 5, 1959, respondent filed a verified answer to said complaint alleging as follows:

"First Defense

"Complainant has failed to file her complaint within ninety days after the alleged act of discrimination as prescribed by Section 297 of the New York State Law Against Discrimination.

"Second Defense

"Respondent, Capital Airlines, Inc. (hereinafter "Capital") has not hired or refused to hire and does not hire or refuse to hire employees in any flight capacity, including that of flight hostess, within the State of New York. As a consequence, Section 296.1 (a) of the New York State Law of Discrimination has no applicability to the alleged factual situation upon which complainant bases her claim.

"Third Defense

"With respect to the charges alleged by the complainant, Capital denies each and every allegation contained in Paragraphs First and Second of the charges.

"With respect to the particulars alleged by the complainant, Capital answers each of the numbered paragraphs of the particulars as follows:"

(Then follow paragraphs 1 through 17 setting forth respondent's admissions, denials and allegations that it is without knowledge or information sufficient to form a belief.)

Pursuant to said notice of hearing, a hearing was held at the office of the Commission at 270 Broadway, New York, New York, on July 14 and 15, 1959 before Presiding Hearing Commissioner J. Edward Conway and Hearing Commissioners John A. Davis and Mary Louise Nice, sitting as the Commission, the said Commissioners having been duly designated by the Chairman of the Commission, all in accordance with

Section 297 of the Law and Rule 7 of the Commission's Rules Governing Practice and Procedure.

All parties to the proceeding appeared and were afforded full opportunity to be heard, to examine and to cross-examine witnesses and to introduce evidence bearing upon the issues.

The case in support of the complaint was presented before the Hearing Commissioners by Henry Spitz, Esq., General Counsel of the Commission, by Solomon J. Heifetz, Esq., Associate Counsel.

The case in support of the answer was presented before the Hearing Commissioners by Adair, Ulmer, Murchison, Kent and Ashby, Esqs., attorneys for respondent, by Macon M. Arthur, Esq. of counsel.

After complainant and respondent completed their proof, the Hearing Commissioners afforded an opportunity to both parties to argue orally. Counsel presenting the case in support of the complaint argued orally and counsel for respondent waived such right, requesting instead the opportunity to file a brief. The Hearing Commissioners granted said request and directed that both parties might serve and file briefs within 30 days and reply briefs within two weeks thereafter.

Main briefs were served and filed by both parties and a reply brief was served and filed in support of the complaint. No reply brief was filed by respondent.

The Hearing Commissioners have considered all of the evidence presented at the hearing and all of the arguments presented by both parties.

The opinion of the Hearing Commissioners is attached hereto.

Upon all of the evidence at the hearing herein, the New York State Commission Against Discrimination, by Presiding Hearing Commissioner J. Edward Conway and Hearing Commissioners John A. Davis and Mary Louise Nice, finds that the respondent, Capital Airlines, Inc., has engaged in unlawful discriminatory practices as defined in the New York State Law Against Discrimination (Executive Law, Article 15) and states its findings of fact as follows:

FINDINGS OF FACT

Complainant

1. The complainant, Patricia Banks, resides at 106-12 Pinegrove Street, Jamaica, Queens, City and State of New York.

2. Complainant is a Negro, 22 years of age, single, 5'6" tall, weighs 120 pounds, has overall dimensions proportionate with her height and weight and is in good health.

3. Complainant graduated from high school in 1955, attended Queens College day course from September 1955 to January 1956 and its evening course from September 1958 to the present time.

4. While attending high school, complainant worked for about 5 months after school and on Saturdays as a cashier in a luncheonette. During the summer of 1954, she worked as an assistant to the instructor at a county youth center and from March 1956 to the present time, she has been employed as an IBM operator by Consolidated Edison Company.

5. Complainant has a well-groomed appearance, a cultured manner and a pleasing personality. She has a calm demeanor and exercises good judgment generally and acuity under stress.

Respondent

6. Respondent, Capital Airlines, Inc., is a Delaware corporation, which originally, under the name of Pennsylvania-Central Airlines Corporation, and subsequently, under its present name, has conducted its general office at the National Airport, Washington, D. C.

7. Respondent's business is that of air transportation of passengers, mail and property.

8. Since 1939, respondent has been doing a substantial amount of its business in the State of New York. In 1946, respondent received from the New York State Department of State a certificate of authority authorizing it to do business in the State of New York.

9. Respondent has conducted and still conducts passenger terminals and ticket and passenger information offices at various cities within the State of New York including New York City, Buffalo, Rochester and Elmira-Corning. In addition, respondent has conducted and still conducts a traffic and sales office at 595 Fifth Avenue, New York City.

10. At all times hereinafter mentioned, respondent has employed and still employs hundreds of employees within the State of New York.

11. At all times hereinafter mentioned, respondent was and is an employer within the meaning of Section 292.5 of the New York State Law Against Discrimination.

No Negro Ever Employed In Flight Capacity.

12. At all times hereinafter mentioned, respondent has employed and still employs at one time about 1350 persons in flight capacities, including pilots, co-pilots, engineers and hostesses.

13. Of all the persons ever employed or now employed by respondent in flight capacities, none was or is a Negro.

14. At all times hereinafter mentioned, respondent has employed and still employs at one time about 570 flight hostesses.

15. The job turnover in respondent's flight hostess positions has been and is about 40% annually and respondent has hired and still hires about 230 new flight hostesses each year.

16. Since 1945 to the present time, respondent has hired several thousand flight hostesses.

17. Of all the flight hostesses ever employed or now employed by respondent, none was or is a Negro.

Respondent's Solicitation, Recruitment, Training, Selection and Hiring of Flight Hostesses within the State of New York.

18. Each of respondent's offices in New York State distributes to applicants for flight hostess positions Capital's "Application for Employment" forms, Capital's "Hostess Supplement" forms and Capital's statements entitled "General Information and Qualifications for Airline Hostesses."

19. On September 22, 1954, respondent entered into a written contract with the Grace Downs Air Career School, located in New York City, which in substance and effect made the school the agent of respondent for the purpose of soliciting, recruiting, training, selecting and placing applicants for flight hostess positions with respondent.

20. Said contract is the only existing agreement in writing between respondent and the Grace Downs Air Career School.

21. Said contract provides:

"The following constitutes an agreement between Capital Airlines and Grace Downs Air Career School:

"No. 1. That Capital Airlines, hereinafter referred to as the Airline, will have the opportunity of interviewing each and every student passing the qualifications required

by them approximately two weeks before each graduation—but

"No. 2. That the airline in no way is obligated to hire any of the girls unless they desire to do so.

"No. 3. That the Airline agrees to assign an interviewer to visit the Grace Downs Air Career School, hereinafter referred to as the School, eleven times each year on the dates specified by the School. The full schedule to be submitted each year in advance.

"No. 4. That the School agrees to move the girls selected into special and specific Capital Airline training and the School will engage the services ofor any person recommended by the Airline to give this training and to otherwise instruct the general portion of the course. If the Airline cannot release anyone for permanent employment to the School, then the Airline agrees to send an instructor to the School to instruct the School's faculty in the policies and specific procedures for Capital Airline hostesses.

"No. 5. The School agrees to efficiently and in a personalized manner handle all of the correspondence regardless of age ("too young or too old") in the interest of good public relations between the Airline and the inquirer.

"No. 6. The School agrees never to promise employment to any one and to be most selective in recruiting students.

"No. 7. The Airline agrees that any one making inquiry regarding a hostess position will receive a notice from the Airline that fully trained hostesses are available to them through the School and that if the School accepts them for training the Airline will interview them at the School shortly before graduation on their established interview dates throughout the year.

"No. 8. The Airline agrees not to recruit hostesses from any other source until such time as the School cannot supply a sufficient number of girls considered outstanding by the Airline to meet its needs.

No. 9. The Airline agrees to furnish the School each week with a name and address list of those who made inquiry and further agrees to alert all persons likely to be approached at any base that the School is the source of recruiting hostesses.

"No. 10. This agreement may be terminated

by either party to take effect 90 days following written notice by registered mail.

"No. 11. The School further agrees to abide by all other provisions set forth in the resume which is made part of this agreement.

"No. 12. The Airline further agrees to furnish the School with a Glossy print of each student engaged, as quickly as time shall permit.

"No. 13. The Airline agrees to submit the names of those accepted as quickly as possible even though their employment date is far in the future.

"This enables the School to give a definite commitment to the student and to hold in abeyance all of those selected who desire to fly for Capital regardless of the length of time involved between the commitment and the actual starting date. In almost every instance the School is able to find temporary employment for these people until they are called by the Airline. In this way, the Airline can always count on a backlog of hostesses carefully selected and fully trained to draw from when an emergency arises.

"This constitutes the full agreement between the School and the Airline and the same shall not be modified or added to without written agreement between both parties."

22. Said contract incorporated by reference a resume describing the school's activities and operations, including a list of about eighty subjects constituting its curriculum, and statements about its faculty, sessions, compensation, public relations, advertising and publicity.

23. Said resume incorporates by reference a form entitled "Application for Employment Grace Downs Air Career School" which contains inquiries as to an applicant's personal data, education, employment, references, military service and experience.

24. Said contract was signed on behalf of the school by Grace Downs, its owner and Dean, and on behalf of respondent by Althea O'Hanlon, its then Director of Passenger Service and now its Assistant Vice President-Corporate Affairs.

25. On October 22, 1954, respondent's Director of Employment wrote to an applicant for a flight hostess position:

"Capital Airlines has recently arranged to have its entire training program conducted by the Grace Downs Air Career School at 1055 Fifth Avenue, New York, New York, and hereafter only graduates of that school

will be selected for employment as Capital hostesses. If you are interested, we suggest that you write to the school for further information regarding qualifications, placement, and training. They will be pleased to interview you and to give any additional information you may require."

26. On June 24, 1957, the Commission received from respondent a statement entitled "General Information and Qualifications for Airline Hostesses" which provides in part:

"Capital does not train hostesses for employment and under its present policy only girls trained at the Grace Downs Air Career School, 1055 Fifth Avenue, New York are considered for employment."

27. On or about May 6, 1959, the Grace Downs Air Career School distributed along with its application for employment forms a reprint of a full page advertisement in a New York City newspaper which contains a reproduction of the above-quoted letter from respondent's Director of Employment to a flight hostess applicant.

28. From the latter part of 1954 to the present time the Grace Downs Air Career School has been and still is holding itself out to the public as being the exclusive source for the recruitment, selection and placement of applicants for flight hostess positions with respondent.

29. Every advertisement inserted by the Grace Downs Air Career School in Glamour, Vogue, Mademoiselle and Harper's Bazaar magazines and in the New York City Classified Telephone Directories, contains a picture of a Capital Airlines hostess.

30. Each of the fashion magazines has been and still is regularly circulated and sold in New York State.

31. Said advertisements, containing a picture of a Capital Airline hostess, have been and are regularly inserted by the Grace Downs Air Career School in accordance with the contract between respondent and the school, which provides for such advertising by the school on behalf of respondent.

32. Before the Grace Downs Air Career School will accept an applicant for flight hostess training it evaluates and appraises the applicant's fitness for such a position "through an interview-appointment" or by a review of the school's "application for employment" form filled out by the applicant. In addition, the school gives each

applicant a preliminary test similar to an aptitude test.

33. If the school determines that the applicant is qualified and fit to be a flight hostess, the applicant is permitted to enroll in its flight hostess course.

34. The School gives a two-month day course and a three-month evening course for flight hostesses. The evening course requires attendance four evenings a week, three hours a night. New courses start each month.

35. When complainant applied, the tuition fee at the school was about \$200. Subsequently, it was increased to \$300. There is an additional charge of about \$25 for books and supplies.

36. The course of study covers a variety of subjects all aimed at teaching and qualifying the applicant to be a good flight hostess.

37. Respondent arranges specific dates with the school, through its Miss Jean Williams or Mr. Frank Bright, to have respondent's representatives interview the flight hostess applicants. These interviews take place at the school, about once a month, ordinarily several weeks before graduation.

38. Miss Jean Williams is the "right hand man" of Grace Downs, the Dean and owner of the school.

39. Mr. Frank Bright is the interviewing agent of the school; he is the "advisor to students on airline contacts," acts as "liaison between airline and students," "handles the interviews" and "makes arrangements for the airlines to come to Grace Downs."

40. A few weeks after the start of each course the students are informed by the school that representatives of respondent will be at the school to interview them. The students fill out respondent's employment application and hostess supplement forms and submit them to respondent's interviewers.

41. On the date previously arranged, two or three representatives of respondent appear at the school and interview each applicant. Respondent's interviewers are:

Miss Joy Geddes, Chief Hostess in charge of Training and Hiring.

Miss Mary Ann Ghormley, Assistant Chief Hostess

Miss Shirley Schregengost, Chief Hostess
Mrs. Althea O'Hanlon, Director of Passenger Service.

42. Said interviews are conducted initially by an Assistant Chief Hostess or Chief Hostess and

then by a Chief Hostess or Director of Passenger Service.

43. Miss Joy Geddes has been employed by respondent for about fourteen years. For the past nine years she has been Chief Hostess in charge of training and hiring and for the prior five years she was a flight hostess.

44. Mrs. Althea O'Hanlon has been employed by respondent for about ten and one half years. The first ten years she was the Director of Passenger Service, supervising and having jurisdiction over six departments, including the Hostess Department. In December 1958, she was promoted to the position of Assistant Vice President-Corporate Affairs of respondent.

45. Mrs. O'Hanlon has at all times been the supervisor and superior of Misses Geddes, Schregengost and Ghormley.

46. Said interviews by respondent's representatives are conducted at the school eleven times a year.

47. During the course of the interview, each of respondent's representatives, having the applicant's employment application and hostess supplement forms before her, observes, evaluates and analyses all of the applicant's qualifications, including the following: education, employment experience, interests, weight, height, health, face, grooming, figure, body movement, posture, speech and personality.

48. After the interview, each interviewer writes down her comments with respect to the applicant and indicates by code mark or written notation in which category she believes the applicant belongs.

49. The code marks used by the interviewers are as follows:

B+ means "accepted for future employment".

B means "see again".

B- means "rejected".

50. After all applicants scheduled for a given day are interviewed, the interviewers meet at the school or at their New York City hotel room, compare notes and determine into which category each applicant should be placed.

51. One of the interviewers then fills out a form entitled "Placement Information from Capital Airlines to the Grace Downs School". The form contains the three major categories into which the interviewers place each applicant as follows:

(1) "You may advise the following girls that they have been accepted for future employment".

(2) "We may consider but would want to see again."

(3) "We will not consider."

52. At the time of their interviews and thereafter, respondent's representatives do not tell the applicant anything with respect to their status or what their deficiencies, if any, may be, or what they should do about them.

53. After the interviews, the original filled out form entitled "Placement Information from Capital Airlines to the Grace Downs School" is submitted by respondent to the school and a carbon copy is retained by respondent for its records.

54. In addition, after the interviews, Miss Geddes talks to Miss Williams about the applicants.

55. Respondent relies on the school to inform the applicants as to their categories, their deficiencies, if any, and how to remedy them.

56. Upon receipt of said Placement Information Form by the school, the school advises each applicant of her status.

57. Applicants placed in the "accepted" category are given "a definite commitment" and the school holds "in abeyance all those selected who desire to fly for Capital regardless of the length of time involved between the commitment and the actual starting date." In almost every instance the school is able to find temporary employment for these people until they are called by respondent. In this way respondent can "always count on a backlog of hostesses, carefully selected and fully trained to draw from when an emergency arises."

58. Applicants placed in the "accepted" category are given a special two-and-a-half week course in Capital's techniques. This course is given at the school by a teacher recommended by respondent, pursuant to paragraph four of its contract with the school.

59. Pursuant to paragraph four of said contract, respondent recommended Miss Jean Burns (or Byrnes) to the school to teach the special course in Capital's techniques.

60. At the time of said recommendation, Miss Burns had been employed by respondent for about five years, the last three as a flight hostess and the preceding two years as a reservation agent. While employed as a flight hostess, Miss Burns worked under the supervision of and was instructed by Miss Joy Geddes.

61. Shortly after the execution of the contract between respondent and the school, Miss Geddes,

in order to get the teaching program started, taught at the school. During her teaching period at the school, Miss Geddes remained as an employee of respondent.

62. During Miss Geddes' teaching period at the school, she instructed the instructors in Capital's methods and procedures and one of the instructors taught by her was Miss Jean Burns.

63. Miss Burns taught the special course in Capital's techniques at the school from about the latter part of 1954 to September 1956, when she became ill and resigned. She also taught other flight hostess courses at the school and complainant was one of her pupils in the latter type course.

64. While at the school Miss Burns wore Capital's flight hostess uniform.

65. From September 1956, when Miss Burns resigned due to illness, to the present time, the special course in respondent's techniques has been taught by Miss Jean Williams.

66. Miss Williams, who has been employed by the school since 1953, was recommended by respondent to give the special course, pursuant to the terms of paragraph four of the contract between respondent and the school.

67. The special course is a full time day course. Each "accepted" girl taking the course is required to give up any other job she has and devote her full time to this course.

68. During said special course the trainee is given eleven examinations, most of which relate to respondent's regulations and procedures and to the particular types of planes operated by respondent. All of these tests are given at the school.

69. At the completion of said special training course in Capital's techniques, the trainees are graduated from the Grace Downs School and are sent to Washington D. C., where they "enter a short indoctrination course" for eight days. Capital arranges living quarters for each trainee at about \$2.25 a day and pays each a \$5.00 allowance for each day of training in Washington. Each trainee receives a physical examination. If the applicant completes the indoctrination course and passes the physical, she is placed on respondent's regular payroll.

70. The girls placed in the "see again" category usually have some minor deficiency, which can be easily remedied. The school ordinarily informs these applicants of their "see again" category, what their deficiency is, and advises them how to correct it.

71. When they believe that their deficiency has been remedied the "see again" applicants may contact the school or the school may get in touch with them for the purpose of arranging reinterviews with respondent.

72. Whenever respondent needs hostesses it informs the school and the school arranges for its students to be interviewed.

73. Respondent and the school arrange for reinterviews of applicants to be held at the school and very often second, third and fourth interviews are conducted at the school. The school advises the "see again" applicants of the date set for the reinterview.

74. After reinterviews are held, the "see again" applicants, whose defects have been remedied, are placed in the "accepted for future employment" category, and the usual process for the "accepted" category, as described above, follows.

75. Respondent has never instructed its interviewers to select and hire applicants for flight positions without regard to race, creed, color or national origin.

76. For the period from May 1955 through April 1959, respondent hired 1114 flight hostesses; of that number 803 were hired through the Grace Downs School and 311 were from other sources. The 311 from other sources included applicants previously employed by respondent in other capacities who were upgraded or transferred from within the ranks.

77. For the period from 1955 to April 1959, out of 777 Grace Downs applicants marked "accepted for future employment", 182 dropped out of their own accord and 16 were dropped in Washington. The remaining 579 were hired.

78. For the period from May 1955 to April 1959, out of 471 Grace Downs applicants marked "see again", 116 were subsequently hired.

79. For the period from May 1955 to April 1959, out of 636 Grace Downs applicants marked "won't consider", 19 were subsequently hired.

80. From at least September 1954 to the present time, the school has acted and still acts as agent for respondent in accepting applications from, training and arranging interviews and reinterviews for applicants for flight hostess positions with respondent.

81. From at least September 1954 to the present time, the school has been and is the principal source for the recruitment and hiring of flight hostesses by respondent.

82. From at least September 1954 to the present time, every major decision with respect to the

solicitation, recruitment, training, selection and hiring of Grace Downs applicants for flight hostess positions by respondent's officials charged with these duties was made and still is being made in the State of New York.

83. Respondent maintains ten crew base stations for flight hostesses, two of which are in New York State, one at New York City and the other at Buffalo.

84. Some of the flight hostesses recruited, trained and hired through the Grace Downs School are stationed at the crew base stations in New York City and Buffalo and have their base of operations in one of these cities.

85. If complainant had been hired by respondent "she may have been stationed at a crew base station in New York City or in Buffalo" and had her base of operations there.

86. Respondent flies planes intrastate from and to its air terminals in New York City, Buffalo, Rochester and Elmira-Corning and also interstate from and to said air terminals.

87. Respondent maintains seven major flight routes from and to New York City and four major flight routes from and to Buffalo.

88. On each of said intrastate and interstate flights, respondent employs and uses flight hostesses.

89. Many of the flight hostesses recruited, trained and hired by respondent through the Grace Downs School perform a substantial portion of their services within the State of New York.

90. If complainant had been hired by respondent, she might have performed a substantial portion of her services within the State of New York.

*Complainant's Training At The
School, Interview By The
Respondent And Subsequent Rejection*

91. In the latter part of June 1956, complainant, having the physical, mental and personality qualifications and the educational background and work experience required to be a flight hostess, enrolled at the Grace Downs Air Career School in New York City for its flight hostess course.

92. When complainant enrolled at the school, she filled out a form, entitled "Application for Employment, Grace Downs Air Career School," which contains detailed inquiries as to her prior work experience. This application is used by the

school as a means for obtaining qualifying information.

93. Before she was accepted for flight hostess training by the school, complainant was required to take a test similar to an aptitude test. She passed the test with a mark of 90%.

94. After checking her application for employment and noting that she passed the screening test, the school found her qualified, accepted \$200 from her for tuition fees and \$25 for books, and enrolled her in the regular flight hostess course.

95. The students at the school, including complainant, were led to believe by the school's staff that if they successfully completed the course of instruction which they offered for air hostesses, they would be qualified to apply for such position.

96. Complainant attended the school evenings for about three months and graduated in September 1956.

97. In July 1956, complainant was told by the school that representatives of respondent would interview applicants for flight hostess positions at the school. Complainant was given and filled out respondent's employment application and hostess supplement forms, containing detailed inquiries as to her prior work experience.

98. On August 1 and 2, 1956, two representatives of respondent, its Chief Hostess and its Director of Passenger Service, appeared at the school and interviewed all of the girls taking the flight hostess course, including complainant.

99. Complainant was first interviewed by the Chief Hostess and then by the Director of Passenger Service.

100. Said application for employment and hostess supplement forms filled out by complainant were before the interviewers when they interviewed complainant.

101. Said interviewers observed, analyzed, and evaluated all of complainant's qualifications, appearance and personality, and made written comments covering same.

102. On August 2, 1956, when the interviews were over, said Director of Passenger Service filled out and submitted to the school the form entitled "Placement Information from Capital Airlines to the Grace Downs School" advising the school of the "accepted", "rejected", and "see again" applicants.

103. When the interviews were over, respondent immediately "accepted for future employ-

ment" twenty-three girls, rejected sixteen, and placed twelve in the "see again" category.

104. All of said girls, with the exception of complainant, were white girls.

105. Of said twenty-three applicants "accepted for future employment", two subsequently dropped out of their own accord, one was dropped in Washington, D.C., and twenty were hired.

106. Of said twelve applicants marked "see again", five were subsequently hired.

107. Complainant was placed in the "see again" category. Both of her interviewers claimed that she had no work experience with the public and her second interviewer stated "tooth needs to be fixed." These were the only reasons ascribed for her non-acceptance.

108. The Chief Hostess failed to note any tooth deficiency on her evaluation comments as to complainant.

109. Before complainant's interview by respondent's representatives on August 1, 1956, no one of the school's "trained staff, comprised of former airline executives and teachers" ever told her that she lacked work experience with the public.

110. The experience which complainant had, at the time of her interview, was sufficiently public in nature to qualify her for the position of flight hostess with respondent.

111. Some white applicants with very little work experience and others with no public work experience were "accepted for future employment" immediately after their interviews.

112. The majority of respondent's flight hostesses, when hired do not have public work experience.

113. Complainant was not told by her interviewers into what category she would be placed and was not told anything about her alleged lack of work experience with the public or that a "tooth needs to be fixed."

114. The tooth in question was the next to the last tooth in the upper right side of complainant's mouth and the defect in said tooth was of a minor nature.

115. Prior to her interview, no one of the school's staff mentioned to complainant that she had a defect in a tooth.

116. A few days after the interview, all of the applicants, other than complainant, were notified by Miss Williams of the school of their "acceptance," "rejection," or "see again." Complainant was told nothing. Complainant then,

on her own, went to Miss Williams and asked her if she had heard anything from respondent concerning herself. Miss Williams said "very little," was "very evasive" and tried to encourage complainant to accept a ground job. Complainant was not willing to accept a ground job.

117. Thereafter, while she was still attending the school, complainant spoke to Miss Jean Burns (or Byrnes) at the school.

118. Miss Burns told complainant that "she was sorry about Capital, that I hadn't heard an answer from them and she told me that Miss Geddes has spoken to her and told her that she did everything she could to hire me but that it was the policy of Capital Airlines and other airlines not to hire Negroes in any flight capacity".

119. Complainant completed her course of study at the Grace Downs School in September 1956, and was given a "Certificate of Graduation" which certifies that the recipient is qualified to be employed as a flight hostess.

120. A few months after she graduated complainant had her tooth fixed.

121. After having her tooth fixed and in December 1956, complainant telephoned the school and spoke to Mr. Frank Bright, the school's interviewing agent. She asked if it would be possible for him to arrange another interview with respondent. He replied that "Capital Airlines did not want to see girls a second time".

122. On February 1, 1957, complainant made, signed, and filed a verified complaint against respondent with the Commission wherein she charged respondent with unlawful discriminatory practices relating to employment in that respondent refused to hire her as a flight hostess because of her color and further that it is the policy of respondent not to employ Negroes as flight hostesses.

123. In said complaint, complainant, among other particulars, set forth the substance of her conversation with Miss Jean Burns.

124. In March 1957, Commissioner Elmer A. Carter, the duly assigned Investigating Commissioner, advised respondent of the charges filed against it and began his investigation of the complaint. At first he was assisted by Field Representative Harry Anderson and subsequently by Field Representative Jean Brown.

125. On June 24, 1957, Field Representative Anderson received from respondent: (1) a statement entitled "Capital Airlines, Inc.—General

Information and Qualifications for Airline Hostesses"; (2) a form entitled "Capital Airlines Application For Employment"; and (3) a copy of the 1956 Annual Report of Capital Airlines.

126. In October 1957, Field Representative Brown, as part of her investigation, conferred with respondent's Personnel Manager and Chief Hostess.

127. During said conference, the Chief Hostess stated that Miss Williams had told her that complainant had been hired by TWA and that she was told this before respondent was notified of the filing of the original complaint. The Personnel Manager stated that he had been informed that complainant had been hired by TWA and although she had been marked "may consider-see again"; she was then taken off said list.

128. During said conference, Field Representative Brown told the Personnel Manager or Chief Hostess that complainant had not been hired by TWA or any other airline and asked them to reinterview complainant. They were unwilling to do so.

129. Respondent was first notified of the filing of the original complaint in March 1957.

130. In July 1957, complainant applied to TWA for a flight hostess position but was never hired.

131. The Chief Hostess never checked to see whether or not complainant had been hired by TWA.

132. In October 1958, complainant personally went to the Grace Downs School, spoke to Miss Jean Williams and asked her to arrange another interview for her with respondent. Miss Williams replied that respondent does not see girls a second time.

133. Respondent maintains a practice of interviewing applicants for flight hostess positions who have been marked "see again" a second, third, or a fourth time. In some instances, respondent reinterviews applicants who had been originally rejected. After such reinterviews, many of the "see again" applicants and some of the rejected group are hired.

134. Mr. Frank Bright and Miss Jean Williams told falsehoods to complainant, which were designed to prevent complainant from obtaining reinterviews at times when the minor deficiency in her tooth no longer existed and when complainant was fully qualified for a flight hostess position.

135. Mr. Bright and Miss Williams knew the

usual practice of respondent and knew that respondent conducted reinterviews with applicants for flight hostess positions.

136. In speaking to complainant, Mr. Bright and Miss Williams were performing their usual and ordinary functions on behalf of respondent, that is, advising applicants and arranging for reinterviews between applicants and respondent; and when they falsely informed complainant that respondent did not reinterview, they did so as agents of respondent.

137. On November 3, 1958, complainant made, signed, and filed a verified amended complaint particularizing in greater detail the charges of her original complaint and taking account of facts adduced during the course of the investigation.

138. Thereafter, Investigating Commissioner Carter, with the assistance of the Commission's staff, continued his investigation of said complaint, as amended.

139. On May 3, 1959, Investigating Commissioner Carter issued a "Statement, Determination of Probable Cause and Direction for Issuance of Notice of Hearing".

140. On May 26, 1959, Investigating Commissioner Carter caused to be issued and served on the parties herein a notice of hearing together with a copy of said complaint, as amended.

141. On July 14 and 15, 1959, the undersigned Commissioners, duly designated by the Chairman, conducted the hearing herein.

142. At said hearing, when the Presiding Hearing Commissioner asked respondent's representative whether respondent would reinterview complainant, he failed to receive an affirmative answer.

143. The designation of complainant by respondent's interviewers in the "see again" category and their failure to place her in the "accepted for future employment" category occurred in the State of New York.

144. The failure of respondent's representatives and of respondent's agent, the Grace Downs School, to arrange for a reinterview of complainant occurred in the State of New York.

145. Normally, reinterviews of Grace Downs applicants take place within the State of New York.

146. The evasions and the falsehoods by Mr. Frank Bright and Miss Jean Williams, as agents for respondents, designed to prevent complainant from being reinterviewed, occurred within the State of New York.

147. Respondent's continued refusals to hire complainant because of her color occurred within the State of New York.

148. Respondent's continued policy of barring Negroes from employment because of their color in flight hostess positions was carried out and effectuated within the State of New York.

149. Complainant is an inhabitant of the State of New York.

Crossing Out of Complainant's Code Mark

150. Of the fifty-one applicants interviewed on August 1 and 2, 1956, and of the thirty-one applicants interviewed on February 27, 1957, by respondent's representatives the only instance where a code mark was crossed out and a written statement substituted was that of complainant.

151. The Chief Hostess testified that she marked complainant "B" at the time of her interview and after discussion with the Director of Passenger Service crossed out the "B" and wrote in "see again".

152. She had no reasonable explanation to offer as to why it was necessary to cross out a code mark meaning "see again" and replace it by the written notation of "see again."

153. We find as a fact that the original code mark inserted by the Chief Hostess for complainant was a "B+", which means "accepted for future employment". The Chief Hostess changed it to "see again" at the direction of the Director of Passenger Service.

Qualified Negro Girls, Other Than Complainant, Applied to Respondent. None Has Been Accepted

154. Miss Eilene Osborne, a Negro girl desiring to be a flight hostess and having all of the required qualifications, attended and graduated from the Grace Downs Air Career School during the first quarter of 1957.

155. She applied to respondent for a flight hostess position and was interviewed by three of respondent's interviewers on February 28, 1957. This was about one month after she had started at the school.

156. Her three interviewers were the Chief Hostess, an Assistant Chief Hostess and the Director of Passenger Service.

157. After the interview, respondent's interviewers marked Miss Osborne "see again" pri-

marily because she weighed seven pounds more than respondent's maximum weight requirement.

158. Within one month after the interview, Miss Osborne had reduced to a weight which met respondent's weight requirement.

159. While she was still at the school, respondent's representatives returned to reinterview applicants for flight hostess position. They did not reinterview Miss Osborne.

160. Miss Osborne was never reinterviewed by respondent and was never hired by respondent.

161. Miss Osborne was never told by respondent's representatives or by the school that she should contact respondent for a reinterview.

162. No one on behalf of respondent ever contacted or wrote to Miss Osborne.

163. Some white applicants who were overweight at the time of their interviews were placed in the "accepted for future employment" category by respondent's interviewers immediately after their interviews.

164. Miss Eilene Osborne was refused employment by respondent as a flight hostess because of her color.

165. Miss Eilene Osborne is an inhabitant of the State of New York.

166. "Quite a number" of Negro girls have taken and completed the flight hostess course at the Grace Downs Air Career School.

167. The school maintained a practice of having its flight hostess students apply to respondent for flight hostess positions. Said Negro girls who took and completed the flight hostess course at the school followed that practice and applied to respondent for flight hostess positions. None of them was hired.

Failure of Respondent's Key Personnel to Testify

168. Mr. R. J. Wilson, respondent's Vice-President in charge of Properties and Personnel signed and verified respondent's answer. He did not appear or testify at the hearing.

169. Mr. C. P. Hutchens, respondent's Personnel Manager was present in the hearing room on both days. He did not testify.

170. Miss Jean Williams of the Grace Downs Air Career School was present in the hearing room throughout the first day's hearing. She did not appear on the second day of the hearing and she did not testify.

*Complainant Refused Employment
Because of Her Color. Respondent
Maintains a Policy of Barring Negroes
From All Flight Positions.*

171. From about June 1956 to the present time, complainant desired and still desires employment as a flight hostess with respondent.

172. Each time that complainant applied or sought to be reinterviewed for the position of flight hostess with respondent, each time that the Commission's representatives tried to obtain a reinterview for complainant and thereafter up to the present time, flight hostess positions were and still are available with respondent and respondent was and still is selecting, recruiting, and hiring applicants for flight hostess positions.

173. Each time that complainant applied or sought to be reinterviewed for the position of flight hostess with respondent, each time that the Commission's representatives tried to obtain a reinterview for complainant and thereafter up to the present time, complainant possessed and still possesses all of the physical, mental, and personality characteristics and all of the educational and work experience qualifications required by respondent for the position of flight hostess.

174. Negro girls, other than complainant, have applied to respondent for the position of flight hostess. None of them has ever been accepted.

175. Complainant was refused and still is being refused employment as a flight hostess by respondent because of her color.

176. At all times herein mentioned, respondent has maintained and still maintains a policy of barring Negroes from employment, because of their color, in all flight capacities, including that of flight hostess.

CONCLUSIONS OF LAW

Upon all the evidence at the hearing and the foregoing findings of fact, the New York State Commission Against Discrimination makes the following conclusions of law:

1. At all times herein mentioned, complainant was and still is an inhabitant of the State of New York within the meaning of Section 290 of the Law Against Discrimination.

2. At all times herein mentioned, respondent was and still is an employer within the meaning of Section 292.5 of the Law.

3. At all times herein mentioned, the Com-

mission had and still has jurisdiction over the person of the respondent.

4. At all times herein mentioned, the Commission had and still has jurisdiction over the subject matter of this proceeding and over the instant complaint, as amended.

5. From at least September 1954 to the present time, the Grace Downs Air Career School, located in New York City, has been and still is the agent of respondent for the purpose of soliciting, recruiting, training, selecting and placing applicants for flight hostess positions with respondent.

6. From at least September 1954 to the present time, the principal source of respondent's soliciting, recruiting, training, selecting and hiring of flight hostesses has been and still is the Grace Downs Air Career School, located in New York City, New York.

7. From at least September 1954 to the present time, the major steps in respondent's solicitation, recruitment, training, selection, and hiring of Grace Downs applicants for flight hostess positions has taken place and still is taking place in the State of New York.

8. From at least September 1954 to the present time, every major decision with respect to the solicitation, recruitment, training, selection, and hiring of Grace Downs applicants for flight hostess positions by respondent's officials charged with these duties was made and still is being made in the State of New York.

9. From at least September 1954 to the present time, many of the flight hostesses hired through the Grace Downs Air Career School have performed and still perform a substantial portion of their services within the State of New York.

10. The unlawful discriminatory practices involved herein have occurred and still occur within the State of New York and have deprived and still deprive its inhabitants of their civil rights.

11. If complainant had been hired by respondent, she might have performed a substantial portion of her services within the State of New York.

12. From at least December 1956 to the present time, respondent has committed and continues to commit unlawful discriminatory practices, under Section 296.1(a) of the Law in that respondent has refused and still refuses to hire or employ complainant as a flight hostess because of her color.

13. From at least December 1956 to the present time, respondent has committed and continues to commit unlawful discriminatory practices, under Section 296.1(a) of the Law in that respondent has maintained and still maintains a policy of barring Negroes from employment because of their color, in all flight capacities, including that of flight hostess.

14. The first time that complainant was rejected by respondent for the position of flight hostess because of her color was in December 1956 and on February 1, 1957, less than 90 days thereafter, complainant filed her original complaint herein.

15. Thereafter, respondent refused to reinterview complainant because of her color in October 1957, in October 1958 and in July 1959.

16. Respondent's rejections of complainant and respondent's policy of barring Negroes from employment because of their color in all flight capacities, including that of flight hostess, are unlawful discriminatory practices of a continuing nature.

17. The original complaint was properly amended in November 1958 in accordance with Section 297 of the Law.

18. Both the original and amended complaints were timely filed within the meaning of Section 297 of the Law and Rule 2e of the Rules Governing Practice and Procedure Before the State Commission Against Discrimination.

DECISION

Upon all of the evidence at the hearing herein, The New York State Commission Against Discrimination finds and determines:

1. The Commission has jurisdiction over the person of the respondent, over the subject matter of this proceeding and over the instant complaint, as amended.

2. Respondent has committed and continues to commit unlawful discriminatory practices under Section 296.1(a) of the New York State Law Against Discrimination in that respondent has refused and still refuses to hire or employ complainant as a flight hostess because of her color and further in that respondent has maintained and still maintains a policy of barring Negroes from employment because of their color, in all flight capacities, including that of flight hostess.

3. Both the original and amended complaints were timely filed under Section 297 of the Law

and Rule 2e of the Commission's Rules of Practice.

ORDER

Upon the basis of the foregoing Decision, Findings of Fact and Conclusions of Law and pursuant to Section 297 of the Law Against Discrimination (Executive Law, Article 15), it is hereby

ORDERED, by the New York State Commission Against Discrimination (by Presiding Hearing Commissioner J. Edward Conway and Hearing Commissioners John A. Davis and Mary Louise Nice):

1. That the respondent, Capital Airlines, Inc., its officers, directors, managers, agents, employees, representatives and interviewers shall cease and desist from:

- a. Refusing to hire or employ complainant, Patricia Banks, as a flight hostess because of her color; and
- b. Maintaining a policy of barring Negroes from employment because of their color, in all flight capacities, including that of flight hostess.

2. That the respondent, Capital Airlines, Inc., its officers, directors, managers, agents, employees, representatives and interviewers shall take the following affirmative action which, in the judgment of the Commission, will effectuate the purposes of the Law Against Discrimination:

- a. Hire complainant, Patricia Banks, as a flight hostess, subject only to:
 - (1) her taking and passing the usual two-and-a-half week course in Capital's techniques given to "accepted" applicants under the same conditions and standards as were applied to white applicants in December 1956 or as are applied to white applicants at present, whichever is less onerous; and without the payment of any fee;
 - (2) her taking and passing the usual type of IQ test given to flight hostess applicants under the same conditions and standards as were applied to white applicants in December 1956 or as are applied to white applicants at present, whichever is less onerous;
 - (3) her taking and passing the indoctrination course for flight hostesses and

the physical examination given by respondent under the same conditions and standards as were applied to white applicants in December 1956 or as applied to white applicants at present, which ever is less onerous; and

- b. Hire applicants for all flight positions, who are recruited, trained and selected within the State of New York, solely on the basis of merit and without regard to their race, creed, color or national origin;
- c. Advise and direct in writing all of the respondent's officers, directors, managers, agents, employees, representatives and interviewers having any duty or function with respect to the solicitation, recruitment, training, selection or hiring of flight hostesses or of any other flight personnel within the State of New York, including but not limited to the Grace Downs Air Career School, its owner, Dean, supervisors and interviewing agents or any other schools, teachers, recruitment personnel or interviewing agents used by respondent for such functions within the State of New York, that it is the policy and intent of the respondent to comply fully with the New York State Law Against Discrimination and that in the recruitment, training and selection of all flight personnel within the State of New York, respondent will

hire solely on the basis of merit and without regard to race, creed, color, or national origin;

- d. Furnish the Commission with copies of said directive signed by each recipient to indicate its receipt by each of them;
- e. Post and maintain in a conspicuous place where applicants for flight hostess and other flight positions may see it, at each of respondent's offices and terminals where employment application forms are distributed and at each location where interviews are conducted within the State of New York a copy of the Commission's poster, furnished by the Commission; and
- f. Notify the New York State Commission Against Discrimination at its office at 270 Broadway, New York, New York, in writing within 30 days from the date of service of this Order as to respondent's compliance with this Order.

STATE COMMISSION AGAINST DISCRIMINATION

/S/ J. Edward Conway
Presiding Hearing Commissioner
/S/ John A. Davis
Hearing Commissioner
/S/ Mary Louise Nice
Hearing Commissioner

Opinion

The complainant, who is a Negro, filed a verified complaint with this Commission on February 1, 1957, and thereafter and on November 3, 1958, said complaint was duly amended and is the subject of this proceeding. Complainant therein charges that respondent has committed and continues to commit unlawful discriminatory practices in that respondent has refused and still refuses to hire or employ her as a flight hostess because of her color. Complainant further charges that respondent has committed and continues to commit unlawful discriminatory practices in that respondent has maintained and still maintains a policy of barring Negroes from employment because of their color, in all flight capacities, including that of flight hostess.

The Chairman of the Commission, as the duly assigned Investigating Commissioner, made investigation of said amended complaint and determined that probable cause exists to credit its allegations. He endeavored by conference, conciliation and persuasion to eliminate the unlawful discriminatory practices complained of but respondent failed to accede to his efforts and refused to eliminate said unlawful discriminatory practices.

The Investigating Commissioner thereupon, in accordance with Section 297 of the Law Against Discrimination, caused to be issued and served in the name of the Commission, a notice of hearing together with a copy of the complaint, as amended, requiring respondent to answer the charges of such complaint at a hearing before

three members of the Commission, sitting as the Commission, at a time and place specified in such notice.

The undersigned, Commissioners J. Edward Conway, John A. Davis and Mary Louise Nice, duly designated by the Chairman, conducted the hearing.

The case in support of the complaint was presented by Henry Spitz, General Counsel of the Commission, by Solomon J. Heifetz, Associate Counsel. Respondent filed an answer and appeared at such hearing by Adair, Ulmer, Murchison, Kent and Ashby, its attorneys, by Macon M. Arthur, of counsel.

[Both Charges Denied]

In its answer, respondent denied both charges of the amended complaint and interposed two separate affirmative defenses.

The first such defense alleged that complainant failed to file her complaint within ninety days after the alleged act of discrimination as prescribed by Section 297 of the Law Against Discrimination.

The second defense so interposed alleged that respondent has not hired or refused to hire and does not hire or refuse to hire employees in any flight capacity, including that of flight hostess, within the State of New York and that Section 296.1(a) of the Law Against Discrimination has no applicability to the alleged factual situation upon which complainant bases her claim. In short, respondent contends that candidates for such positions are hired in Washington, D. C. and not in New York State.

As to the first defense, respondent's contention cannot be sustained; it has no merit as applied to both the first and second charges of the complaint.

Complainant was interviewed for the position of flight hostess by respondent's representative on or about August 1st, 1956, at which time she was placed upon a list which respondent designates as the list of those which respondent would see again for further consideration. Complainant was not rejected at said interview. When in December of 1956, complainant sought to be reinterviewed by respondent, she was falsely told that respondent does not reinterview applicants. This refusal to reinterview, constituted complainant's first rejection by respondent.

On February 1, 1957, clearly within 90 days after her December 1956 rejection, complainant filed her original complaint against respondent

charging it with unlawful discriminatory practices. Thus, based on a simple computation of days between the date of complainant's first rejection and the date of the filing of the complaint, the instant proceeding was timely instituted.

[Argument Rejected]

Furthermore, respondent's statute of limitations defense has no merit because it fails to take account of Rule 2e of the Commission's Rules of Practice. The unlawful discriminatory practices alleged and proved here are of a continuing nature. In October 1958, complainant again sought to be reinterviewed by respondent but was again falsely told that respondent does not reinterview. When the Commission's Field Representative was investigating this complaint on October 15 and 16, 1957, she asked the Personnel Manager and the Chief Hostess of respondent if they were willing to reinterview complainant and they refused such reinterview. Upon the hearing, in response to inquiries relative to reinterview of complainant, respondent indicated no desire to do so. During all this time complainant actively and continuously sought employment as a flight hostess and still desires such a position with respondent.

The alleged unlawful policy of barring Negroes from flight employment is not an isolated act which occurred on a particular day. The record shows that it is a policy of long standing—a policy which has existed and continues to exist throughout the period of time involved herein.

Respondent's statute of limitations defense, as applied to both charges of the complaint, must be overruled.

Respondent's second defense is equally untenable. There are twenty-two possible steps involved in respondent's pre-employment procedures for flight hostesses all of which are undertaken in New York State. Applicants are solicited in this State. Respondent's contract with Grace Downs Air Career School, by its very terms, indicates that respondent and the school jointly engaged in efforts to recruit flight hostesses. Intensive training, specifically in Capital Airlines methods and procedures was given by the Grace Downs School and by an instructor whom respondent had the right to recommend. Interviews were conducted by respondent at the School eleven times a year and respondent's representatives there rejected, accepted or gave

a conditional rating to each applicant. True, those accepted were then sent to Washington for physical examinations and a short indoctrination course but even here respondent compensated them in part.

[Operations in New York]

All of the major steps and decisions in connection with the employment process were conducted and made in New York State. That the decision to employ might, in an isolated case, later be reversed, is of no moment.

Furthermore, the Law Against Discrimination declares, "It shall be an unlawful discriminatory practice: (a) For an employer, because of the age, race, creed, color or national origin of any individual . . . to bar . . . from employment such individual . . ." (§ 296, subdivision 1, emphasis supplied). The refusal to consider for employment any person upon the specified grounds constitutes a bar in violation of the law. Complainant was thus barred by respondent within the State of New York.

There remains for consideration the merits of complainant's two charges. The first charge poses the question as to whether complainant was rejected by respondent because of her color and the second presents the issue of whether respondent has maintained a discriminatory policy with respect to flight personnel. It is clear that complainant was so rejected and that respondent does have such a policy.

Complainant possesses all of the qualifications for the position. She completed the course of training and received her certificate from Grace Downs Air Career School. The Hearing Commissioners have been impressed with her well-groomed appearance, her cultured manner, her pleasing personality, her complete frankness and her calmness and acuity under stress. Her diligence in preparing herself for the position she sought and her continued pursuit of higher education are evidences of her good judgment, industry and ambition.

All arrangements for interviews were made by the school officials. When respondent interviewed the complainant, nothing was said to her as to the outcome. This was standard practice. Respondent thereafter notified the school, which, in turn, was obligated to notify the complainant. This was not done. However, when complainant's interview was concluded each of the interviewers classified her. Only one (the Director of Passenger Service) noted that com-

plainant had a tooth that required attention. (The tooth in question was the next to the last tooth in the upper right side of complainant's mouth.) That interviewer marked complainant with the code mark "B". The other interviewer (the Chief Hostess) failed to notice anything wrong with the tooth and marked complainant "B" or "B+". "B" means "see again" and "B+" means "accepted for future employment". The Chief Hostess testified that she had marked complainant "B" at the time of her interview and after discussion with the other interviewer crossed out the "B" and wrote in "see again".

[Code Mark Removed]

The record shows that of the 51 applicants interviewed in August 1956 and of the 31 applicants interviewed in February 1957 the only code mark crossed out is that of complainant. The Chief Hostess offered no reasonable explanation for the change in designation. The crossing out of the code mark "B" and the substitution of a phrase meaning exactly the same thing would appear to be a meaningless act. Under the circumstances, it is reasonable to find that the Chief Hostess had marked complainant "B+" but her superior, the Director of Passenger Service, directed her to change the designation.

The fact that complainant was marked "see again" was never communicated to her except that when she inquired as to her status, one of the school staff told her to have her tooth fixed. This, complainant did. Thereafter in December 1956 she sought to be reinterviewed by respondent through the school's interviewing agent and was told that "Capital Airlines did not want to see girls a second time." This was an untruth. Its only purpose was to dissuade complainant from making further efforts to secure the appointment she sought.

The respondent, having made the school its agent, is responsible for the agent's unlawful rejection of complainant and thereby has violated the law. Respondent cannot now be heard to deny the existence of the agency relationship. It cannot accept the benefits of its agent's acts and avoid the consequences.

The existence of an agency relationship between the Grace Downs Air Career School and the respondent, in recruitment of flight hostesses, is established by the record. The school, in advertising, used a picture of a girl in a Capital Airlines uniform. It employed a teacher to instruct its students in specific and special Capi-

tal Airlines training. This instructor wore a Capital Airlines Hostess' uniform at the school. The school was obligated to employ a designated person or "any one recommended" by respondent. The school was obligated to afford respondent the opportunity to interview "each and every student passing the qualifications required by them approximately two weeks before each graduation." Respondent agreed not to recruit from any other source until such time as the school became unable to supply a sufficient number of qualified candidates. All interviews were arranged by the school and the applicants were to be notified by the school as to the result of such interviews, as appears in paragraph one of the resume, which constitutes part of the agreement between respondent and the school.

[Recruitment Role Obvious]

It is difficult to conceive additional action which the school might have undertaken more patently to hold itself out to the public as the recruiting agent of respondent. The respondent has, thru the school's activities consistently recruited flight hostesses. Capital Airlines has developed this program in conjunction with the school and cannot now be heard to deny the existence of the agency to the prejudice of complainant and against the interest of the public.

Even if it were properly contended that the refusal of the school to inform complainant of the outcome of her interview, its refusal to assist complainant to secure further consideration for the position she sought and its deliberate deception of complainant when she sought reinterview, were all independent acts unauthorized by respondent or were acts beyond the scope of the school's authority, respondent is still in violation of the law. Respondent's repeated and consistent refusal to reinterview complainant or to give further consideration to her application is a ratification of the school's acts based upon respondent's own discriminatory policy of employment in flight capacity position.

Respondent employs approximately 600 flight hostesses and the annual turnover in this category approximates forty per cent. Since 1939, respondent has been doing a substantial amount of its business in the State of New York and in 1946 received a formal authorization to conduct such business in New York State. Nevertheless, the record herein indicates a complete absence

of Negroes in all flight capacities including that of flight hostess. The evidence (including respondent's witnesses) shows that respondent never employed a Negro for any such position.

[Not a Coincidence]

This is no mere coincidence. The prime source of respondent's recruitment, the Grace Downs Air Career School, has had Negro students in addition to complainant. In fact, one of complainant's witnesses, a Negro girl, had attended the school and was given substantially the same treatment by respondent as that accorded to complainant. Respondent's Chief Hostess, who testified that she was engaged in interviewing for the past nine years, admitted that she never accepted a Negro applicant for a flight hostess position and knows of no interviewer for respondent who has done so. Although she testified that she could recall only two Negroes whom she interviewed—complainant and complainant's witness—she stated that there may have been others. Furthermore, Miss Williams of the Grace Downs School told the Commission's Field Representative that "quite a number" of Negro girls had taken the flight hostess course. Considering all the facts in the record surrounding the recruitment and training of flight hostesses, it is reasonable to conclude that each of the Negro girls in the "quite a number" who took the course, applied to respondent for flight hostess positions, and it is quite clear that none of them was ever hired.

It is to be noted that the alleged defects upon which respondent based its rejection of complainant and of complainant's witness were remediable and that both were classified "see again." Neither was notified of this classification by respondent or the school. At the same time white applicants with similar defects, and some with greater deficiencies were accepted for employment. It is clear that the color of the applicant dictated the standards to be applied.

The record shows that respondent has had a great need for flight hostesses and that it reinterviewed not only applicants who were marked "see again" but in some instances applicants who had been "rejected". After such reinterviews, many of the "see again" applicants and some of the rejected group were hired. It is therefore incredible that respondent should refuse to reinterview complainant, a "see again" applicant, who remedied her minor defect shortly after her interview. We entertain no

doubt that complainant would have been re-interviewed and employed, had she been white.

[Never given Instruction]

The record herein also establishes the fact that, despite the existence of the Law since 1945, respondent has never given instructions to its interviewers in relation to its policy of employment. Had respondent intended to comply with this law, it would hardly have left so important a matter to the uncertainties of its employees' conjecture. It is this Commission's experience that recruitment officers will not break a long standing all-white pattern of employment in any job category in the absence of a forthright directive which authorizes employment on merit without regard to race and color. Respondent's failure to clarify its policy could be expected to perpetuate its all-white flight crew pattern and may well have been so intended.

In the absence of such a statement, resort to the knowledge and understanding of respondent's employees and recruiting agents is properly had. Complainant testified that while she was still at the Grace Downs School she spoke to the instructor who gave the specific Capital Airlines training. Of this conversation complainant states:

"Miss Byrnes told me that she was sorry about Capital that I hadn't heard an answer from them and she told me that Miss Geddes had spoken to her and told her that she did everything she could to hire me but it was the policy of Capital Airlines and other airlines not to hire Negroes in flight capacity."

Although Miss Geddes denied having made any such statement to Miss Byrnes it is incredible that she would be so quoted by one whom she had trained as an instructor and with whom she had worked closely or that it was an idle statement carelessly made. Furthermore it is significant to note that neither respondent's Personnel Manager nor any other official in responsible charge of the implementation of respondent's policy of employment was produced by respondent as a witness, although the

Personnel Manager was present at the hearing. The failure to assert, under oath, a clear-cut policy of full compliance with the law is consistent only with the tactics of evasion obviously pursued by respondent. It is not the course ordinarily adopted by a respondent who is unjustly accused.

[Fixed Policy]

The history of respondent's activities in its recruitment program demonstrates that it maintains a fixed policy of evasion of the mandate of the Law and deliberately bars Negroes from employment as flight hostesses on the basis of race and color.

Upon the record herein, considered as a whole, we find that the respondent has committed and continues to commit unlawful discriminatory practices, under Section 296.1(a) of the New York State Law Against Discrimination, in that it has refused and still refuses to hire or employ complainant as a flight hostess because of her color.

We further find that the respondent has committed and continues to commit unlawful discriminatory practices, under Section 296.1(a) of the Law, in that respondent has maintained and still maintains a policy of barring Negroes from employment because of their color, in all flight capacities, including that of flight hostess.

Accordingly, pursuant to Section 297 of the Law, we have stated our findings of fact and conclusions of law and are issuing herewith and causing to be served on respondent the attached decision and order requiring respondent to cease and desist from said unlawful discriminatory practices and to take such affirmative action as is set forth therein, which, in the judgment of the Commission will effectuate the purposes of the Law.

/S/ J. Edward Conway
Presiding Hearing Commissioner

/S/ Mary Louise Nice
Hearing Commissioner

/S/ John A. Davis
Hearing Commissioner

HOUSING

Student Housing—Colorado

The Board of Regents of the University of Colorado has approved a statement reminding householders and landlords housing students that the Colorado Fair Housing Act of 1959 (4 Race Rel. L. Rep. 454) is applicable to them.

The following policy, based on the Colorado Fair Housing Act of 1959, was unanimously passed by the Board of Regents on motion of Regent Betz, seconded by Regent Bernick.

The attention of householders and landlords who wish to or do house University of Colorado students is called to House Bill (Colorado) Number 259 known as the Colorado Fair Housing Act of 1959, approved April 10, 1959 by the Forty-second General Assembly. The following sections of the Act are quoted for the information and compliance of persons housing students:

Section 3, (1), (c): "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended, arranged, or occupied as the home or residence of one or more human beings; or any vacant land for sale or lease; but does not include premises maintained by the owner or lessee as the household of his family with or without domestic servants and not more than four boarders or lodgers.

Section 5: (1) It shall be unfair housing practice and unlawful and hereby prohibited:

(a) For any person having the right of ownership, or possession, or the right of transfer, rental or lease of any housing:

(i) To refuse to transfer, rent, or lease,

or otherwise to deny to or withhold from any person or persons such housing because of race, creed, color, sex, national origin, or ancestry.

(ii) To discriminate against any person because of race, creed, color, sex, national origin, or ancestry in the terms, conditions, or privileges pertaining to any housing, or the transfer, rental, or lease thereof, or in the furnishing of facilities or services in connection therewith.

If it should come to the attention of the University that a property listed with a University housing office is not equally available to all students regardless of race, religion or nationality, or if a complaint is made that a property owner has shown racial discrimination in the selection of student occupants, the matter will be referred for investigation to the appropriate University committee. If the committee finds discriminatory practices have been in effect, the listing services will be denied the property owner and his rental listing will be withdrawn until there is assurance that such practices have been ended. Such cases may be referred to the Anti-Discrimination Commission of the State of Colorado for investigation in accordance to the laws and statutes of the State of Colorado.

INDIANS

Jurisdiction—NLRB

TEXAS-ZINC MINERALS CORPORATION¹ v. UNITED STEELWORKERS OF AMERICA, AFL-CIO.

National Labor Relations Board, February 11, 1960, Case No. 20-RC-3851.

SUMMARY: Employees of a uranium mining firm which operated on Navajo tribal lands filed a petition under the National Labor Relations Act, asking for an election to determine union recognition. The Navajo council had approved a resolution prohibiting the solicitation of Union membership on the reservation. At a hearing, a unit appropriate for collective bargain-

ing was established, and an election ordered. The Navajo Tribal Council intervened before the National Labor Relations Board, contending that the board had no jurisdiction in disputes arising in tribal lands, and that, in the instant case, there was nothing "affecting commerce" within the meaning of the National Labor Relations Act. The NLRB rejected both of these contentions and ordered an election held. The shipments of uranium, even though under contract to the Atomic Energy Commission, were transported across state lines and thus were held to "affect commerce." The National Labor Relations Act was held to be congressional legislation concerning a particular field of major national policy, and expressed in such sweeping language as to include Indians and Indian reservations within its application.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Robert Magor, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²

Briefs were submitted by the Petitioner, in behalf of itself and the Joint Intervenors;³ by the Employer; and by the Navajo Tribe of Indians.⁴ The Board has fully considered the briefs and the entire record in this case, and finds:

The Navajo Tribe intervened for the sole purpose of moving to dismiss the petition. The principal issues presented are whether the Act applies to a plant located on the Navajo Indian reservation, and if the Act does apply, whether the Board should assert jurisdiction over such a facility.

The Employer is a corporation which operates a uranium concentrate mill at Mexican Hat, Utah. Pursuant to a contract with the Atomic Energy Commission, the Employer annually ships over \$5,000,000 worth of uranium concentrate to the A. E. C. in Colorado. The Employer's operations are subject to the security regulations of the A. E. C., and the Employer may not sell its product to a third person without the consent of the A. E. C. All the land occupied by the mill is located on the Navajo reservation and leased to the Employer by the Navajo Tribe. Of the 87 employees in the requested unit, 47 are members of the Tribe and

40 are not Indian. The Navajo reservation is comprised of contiguous tracts of land lying in the States of Arizona, New Mexico and Utah; occupies 25,000 square miles, an area equivalent to that of the State of West Virginia; and is inhabited by about 87,000 Indians.

Over a year before the instant petition was filed, the Petitioner⁵ and one of the Joint Intervenors⁶ filed petitions for an election among employees of the Employer. On April 2, 1958, a consent election was conducted off the reservation. The chairman of the Navajo Tribe's governing body immediately protested to the Employer and the Petitioner, claiming that the election was a nullity. In May 1958, while the results of the election were still inconclusive, both petitions were withdrawn with the approval of the Regional Director. During the summer of 1958, the Navajo Tribe's Advisory Committee held hearings at which representatives of unions and management testified with respect to the advantages and disadvantages of unions. August 26, 1958, the Tribal Council approved a resolution⁷ which provides in part:

... It shall be unlawful for any person to solicit for memberships in or to conduct any other incident or adjunct of unionization activities on the Navajo Indian reservation....

• • • • •

... Any Indian who shall knowingly ... violate ... this resolution ... shall be sentenced to labor for a period ... not to exceed 30 days.

... Any non-Indian who shall knowingly ...

1. The name of the Employer appears as corrected at the hearing.
2. The parties' requests for oral argument are denied, as the record and the briefs adequately present the issues and the positions of the parties.
3. The International Union of Operating Engineers, AFL-CIO, and the International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, intervened jointly on the basis of a showing of interest.
4. The Navajo Tribe of Indians is hereafter referred to as the Navajo Tribe.

5. Case No. 20-RC-3469, filed January 14, 1958.

6. Case No. 20-RC-3540, filed April 9, 1958.

7. This resolution was submitted to the Commissioner of Indian Affairs of the Department of the Interior. A memorandum to the Commissioner from the Assistant Solicitor for Indian Legal Activities of the Department of the Interior was admitted in evidence. It states that the law does not require the Commissioner to approve or disapprove the resolution.

violate . . . this resolution . . . shall be excluded from Navajo Tribal land

The instant petition was filed May 12, 1959, and the Navajo Tribe, as a special Intervenor, is the sole party herein to oppose the direction of an election.

It is well established the the Indian tribes in America are deemed to have many of the attributes of a nation. Thus, although their external sovereignty has been extinguished, their internal sovereignty is preserved except where limited by treaty or Act of Congress.⁸ The Navajo Tribe contends that it retains broad powers of self-government under its treaty⁹ with the United States and that the Act does not evince a Congressional purpose to supersede Tribal authority over labor relations on the reservation.

In Simplot Fertilizer Company,¹⁰ the Board directed an election among the Indian and non-Indian employees of a plant located on a reservation of the Shoshone-Bannock Tribes. The Navajo Tribe would distinguish that case on the ground that the Shoshone-Bannock Tribes, unlike the Navajos, have adopted a constitution under the Wheeler-Howard Act.¹¹ The constitution and bylaws of the Shoshone-Bannock Tribes provide that the governing body of their reservation shall exercise certain powers

. . . subject to any limitations imposed by the statutes or the Constitution of the United States

In effect, the Navajo Tribe argues that this provision conferred jurisdiction on the Board in the Simplot case and that Simplot is therefore in-

8. See Department of the Interior, *The Federal Indian Law* (1958), p. 398.

9. Treaty of June 1, 1868, 15 Stat. 667. Article II of this treaty states:

"The United States agrees that [the Reservation] . . . shall be, and the same is hereby, set apart for the . . . Navajo Tribe . . . ; and the United States agrees that no persons except . . . such employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article. (Emphasis added) See *Williams v. Lee*, 358 U.S. 217, 221-222 (1959), in which the Supreme Court construed this treaty to mean that . . . the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."

10. 100 NLRB 771; 107 NLRB 1211.

11. The Wheeler-Howard Act provides in part:

Any Indian tribe . . . shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws . . . Act of June 18, 1934, 48 Stat. 987, 25 U.S.C.A. Sec. 476.

apposite. We are not persuaded by this line of argument; for, if the Board possessed jurisdiction in Simplot, it did so by virtue of the Act and not by virtue of tribal legislation. Nevertheless, in light of the importance and novelty of the issues raised by the Navajo Tribe, we have decided to reappraise the finding in Simplot that the Board has, and should exercise, statutory jurisdiction over a commercial enterprise on an Indian reservation.

The Navajo Tribe contends that the instant case does not involve a question "affecting commerce" as that term is used in Section 9 (c) (1), and defined in Section 2 (6) and (7) of the Act. Section 2 (6) of the Act, which defines "commerce," does not mention commerce "with the Indian Tribes." Since Section 2 (6) is fashioned after the "Commerce Clause" in Article I, Section 8, of the Federal Constitution which does refer to commerce "with the Indian Tribes," it is argued that the failure to make such a reference in Section 2 (6) evinces a Congressional purpose to exclude such commerce. In support of this interpretation of the Act, the Navajo Tribe cites the Supreme Court doctrine of *Elk v. Wilkins*.¹² That case contains the following dictum:

. . . General acts of Congress did not apply to the Indians, unless so expressed as to clearly manifest an intention to include them.

In addition, the Navajo Tribe contends that, if the Act were interpreted to apply to Indian reservations, it would conflict with the Act of Congress defining the purview of the Commissioner of Indian Affairs. That statute, which was in force at the time the Wagner Act was passed, states:

The Commissioner of Indian Affairs shall . . . have the management of all matters arising out of Indian relations.¹³

The above contentions merit, and have been afforded, careful study and consideration. We believe, however, that a contrary result is supported by the weight of authority.

Section 2 (6) of the Act defines "commerce," *inter alia*, as . . . trade, traffic, commerce, transportation, or communication among the several States

12. 112 U.S. 94, 100 (1884).

13. See Rev. Stat. Sec. 463, 25 U.S.C.A. Sec. 2.

Since the substantial shipments of uranium concentrate from the Employer's mill cross the Utah and Colorado lines, there is no doubt that these shipments literally constitute "commerce." Thus, although located on an Indian reservation, the Employer's milling operation would clearly appear to affect "commerce" as that term is defined in the Act.

We perceive no valid basis for reading the Act to exclude from its coverage Indians or Indian reservations as a class. It is well established that Congress incorporated into the Act the full sweep of its commerce powers under the Constitution. The Supreme Court has held, for example, that the language of the Act -

... evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce . . .¹⁴

Where, under similar Federal statutes, Congress has legislated concerning a particular field of major national policy and where the reach of the statute is defined in sweeping language, the courts have held that Indians and Indian reservations, although not specifically mentioned, are contemplated within statutory coverage.¹⁵ Thus, in *Superintendent v. Commissioner of Internal Revenue*,¹⁶ the Federal income tax law was held to apply to certain income of a Creek Indian. There, the theory of the *Elk v. Wilkins* case was urged as ground for excluding Indians from coverage of that law. However, the Supreme Court found to the contrary, relying on the broad scope of the statutory references to "every individual" and income derived "from

any source whatever." Similarly, the U.S. Court of Appeals for the Second Circuit referred to the broad statutory coverage of "every male citizen" in holding that the Selective Service Act applied to an Iroquois Indian.¹⁷

In view of all of the foregoing, we are constrained to conclude that the Act applies to commercial enterprises operating on an Indian reservation, and particularly to the Employer in this case. As in our opinion the requisite legal jurisdiction of the Board exists under the Act, we can perceive no validity in the further contention that the Board should nevertheless decline to assert its jurisdiction here. The Employer's operations, which plainly have a substantial impact on interstate commerce and the national defense,¹⁸ meet the requirements of the Board's jurisdictional standards. We have considered the relevant pronouncements of the Congress, the Department of the Interior, and the courts, and we discern no Federal policy encouraging Indian self-government with which an exercise of jurisdiction herein would be at variance. Nor do we believe that the Tribal labor relations resolution and the implied threats stemming therefrom can be grounds for depriving the Employer's employees of their rights under the Act. Accordingly, we find that the Employer's operations affect commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

We find that all production, maintenance, transportation and service-station attendant employees of the Employer at its Mexican Hat, Utah, operations, excluding all office clerical employees, dormitory employees, metallurgical and chemical laboratory employees, technical employees, professional employees, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.¹⁹

17. *Ex Parte Green*, 123 F.2d 862 (C.A. 2 1941), cert. denied 316 U.S. 668.

18. See *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB No. 43; *Siemens Mailing Service*, 122 NLRB No. 13, Member Jenkins concurring specially.

19. The unit was stipulated by the parties.

14. *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 607 (1939); see also *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 391 (1951); *Polish Alliance v. N.L.R.B.*, 322 U.S. 643, 647 (1944); *Floridan Hotel of Tampa, Inc.*, 124 NLRB No. 34.

15. We note that the Solicitor of the Department of the Interior has expressed the opinion that the dictum of *Elk v. Wilkins*, supra, was intended to apply only where a statute would affect the Indians adversely. Pursuant to this theory, the Solicitor has expressed the view that Indians are entitled to the benefits of the Social Security Act and that the Federal Wage and Hour Act applies to certain Indian tribal enterprises. Op. Sol. I. D., M. 29999, November 28, 1938; Op. Sol. I. D., April 22, 1936. Similarly, we believe that employees should not be deprived of the protection of Section 7 of the Act because they are of Indian ancestry, or because the commercial enterprise which provides their employment is located on an Indian reservation. It appears in this case that there is compliance with the Social Security Act and the Internal Revenue Code on the Navajo reservation, and that members of the Tribe may vote in Congressional elections.

16. 295 U.S. 418 (1935).

DIRECTION OF ELECTION²⁰

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulation. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because

20. In its brief, the Navajo Tribe asserts (1) that a direction of election and a requirement that the Employer enter into collective bargaining as to its operations on the Navajo reservation would in effect require the Employer to violate the Tribal labor relations resolution, and (2) that such a violation of Navajo law would entitle the Navajo Tribe to cancel the Employer's lease and shut down the Employer's operations on the reservation. As to (2), the Employer adverts to Paragraph 14 of its lease from the Navajo Tribe, which provides:

... The lessee further agrees that it will not use or permit to be used any part of said premises for any unlawful conduct or purposes whatsoever; ... and that any violation of this clause by the lessee or with its knowledge, shall render this lease voidable at the option of the lessor.

In light of these facts, the Employer requests that the Board stay any order directing an election pending a final judicial determination of the Board's jurisdiction herein. Whether or not the lease can be terminated by the Navajo Tribe on a theory that "unlawful conduct" was committed by the Employer in violation of the Tribal resolutions (which are clearly contrary to statutory law under the Act), is a matter outside the purview of a representation proceeding. Whether or not the Board stays its election order would not affect such rights, as exist, of the Employer or any of the parties to proceed in the courts concerning any matter directly or indirectly involved herein. Since such a stay would be contrary to the Board's consistent practice and would, in our opinion, serve no useful purpose, the Employer's request is denied.

they were ill, on vacation, or temporarily laid off. Those in the military services of the United States may vote, if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.²¹ Those eligible shall vote whether they desire to be represented, for collective bargaining purposes, by United Steelworkers of America, AFL-CIO; or by International Union of Operating Engineers, AFL-CIO, and International Hodcarriers, Building and Common Laborers Union of America, AFL-CIO, jointly; or by neither.

Dated, Washington, D. C.,

s/Boyd Leedom, Chairman
s/Stephen S. Bean, Member
s/John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD
PHILIP RAY RODGERS and JOSEPH ALTON JENKINS, MEMBERS, dissenting:

We dissent because in our view the National Labor Relations Board does not have jurisdiction over the Employer in this case.

Philip Ray Rodgers, Member
Joseph Alton Jenkins, Member

NATIONAL LABOR RELATIONS BOARD

21. Employees engaged in an economic strike which began less than 12 months from the date of the election who have been permanently replaced and their replacements shall vote by challenged ballot.

ORGANIZATIONS

NAACP—Virginia

Application of NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE For an interpretation of § 57-40.

Commonwealth of Virginia State Corporation Commission, December 22, 1959, Case No. 14629.

SUMMARY: The National Association for the Advancement of Colored People applied to the Virginia State Corporation Commission for interpretation of sections of the Virginia code which requires persons and corporations soliciting funds to keep books and to make them available for inspection by state officials. The Commission ruled that under the statute the NAACP must make available the original books, and that copies of required information could not be substituted.

CATTERALL, Commissioner.

Opinion, CATTERALL, Commissioner.

Section 57-40 of the Code was first adopted in 1924 (Acts of 1924, p. 515). In the Code of Virginia it is in Title 57, which is entitled "Religious and Charitable Matters; Cemeteries." It reads as follows:

"§ 57-40. Keeping and inspection of books. - Every person, firm, corporation or association, soliciting subscriptions or contributions to any cause or thing, except as hereinafter provided, shall keep adequate books showing all sums of money collected and how, to whom, and for what disbursed. Receipts shall be kept itemized to as great an extent as may be practicable, and disbursements shall in all cases be itemized and not shown merely by totals.

"The books aforesaid shall be kept at some reasonably accessible place within the limits of this State and shall at all times be open to the inspection of the State Corporation Commission. Such books, however, need not be preserved for a longer period than two years after solicitation has ceased."

As adopted in 1924, the statute provided that the books were to be open to the inspection of the State Accountant and the Attorney General. By Acts of 1948, p. 800, the State Corporation Commission was substituted for the State Accountant and the Attorney General.

The exceptions referred to in § 57-40 are specified in § 57-44, namely, churches, political parties and business enterprises. The chapter does not apply "in any case where less than one hundred and twenty-five persons are jointly or severally solicited for subscriptions or contributions."

The purpose of the statute is clear. The exemption of 125 persons is the line drawn between public and private solicitation. *Those who solicit from the public must keep records open to inspection by representatives of the public.*

One of the more conspicuous facts of modern life is that the public will hand out money to almost anybody who rings the door bell. Within the field of its application the statute applies to soliciting contributions to "any cause or thing." The language could not be broader. It applies to everything from the American Red Cross to the blind beggar on the street corner. It applies

to every community chest and every agency of every community chest. It applies to the Association for the Preservation of Virginia Antiquities, the Mount Vernon Ladies' Association and all the other causes that are deemed sufficiently worthy to be exempted by name from taxation in the Constitution and laws of Virginia. It applies to the loyal alumni who collect athletic scholarships and to those who raise money to give prize books to outstanding high school graduates. It applies to the "Christmas Mother" and to all who collect gifts to buy Christmas dinners for the poor. There is no end to the varieties of public solicitation, and the statute covers all of them.

[Act To Inspect All]

The legislature did not expect the Corporation Commission to inspect the books of all the solicitors. To do so would take a staff of scores of investigators and the General Assembly has not appropriated money for the employment of any investigators. The Commission makes regular inspections of the books of banks, small loan companies, building and loan companies, credit unions, insurance companies, electric, gas, water, sewer and telephone companies and numerous other companies, but it is not equipped to and does not make regular inspections of the books required to be kept by § 57-40. § 57-40 lays down a general public policy of the State. It requires the keeping of books and § 57-46 provides a penalty for failure to keep them. The Commission never demands inspection unless there is some reason for doing so. For example, its attention was recently called to a solicitor who was soliciting money for some kind of political club. The Commission inspected his books for the purpose of inquiring into the bona fides of the solicitation. Last year there were two separate groups soliciting for a single rare disease. There was a good deal of talk about it in the newspapers and the Commission investigated the newer of the two groups. Lately, there has been much public interest in the activities of the National Association for the Advancement of Colored People, and the Commission decided to look at its books. The N.A.A.C.P. replied that it would gladly give the Commission complete excerpts of all the financial transactions shown on its books, but that it would not let the Commission look at its books.

The statute says that we are to inspect the

books. The purpose of the statute would be defeated if it meant less than that. If the statute should be construed to mean that the furnishing of copies was a sufficient substitute for the actual inspection of the books of original entry, any dishonest solicitor could furnish incomplete copies. In demanding inspection of the books we do not suggest that the keeper of the books is dishonest. We have never found dishonesty in the books of the public utilities of this state. We do, however, inspect the original entries and the supporting vouchers in order to know where every dollar comes from and where every dollar goes.

[Construction Asked]

The N.A.A.C.P. asks us to construe the statute to mean that we are to inspect the books of everybody but the N.A.A.C.P. They say that we ought to add an exception to the statute, because if we should inspect the books we would find written there the names of the contributors and we would make the names public. It claims that the Constitution of the United States requires us to make the exception and to withdraw our demand that we be allowed to inspect. The Constitution says that no state shall deny to any person the equal protection of the laws. Since nothing in § 57-40 could be construed to mean that copies of the books are an adequate substitute for inspection, the applicant is really asking for a favorable construction of the 14th Amendment. They ask us to hold that "equal protection of the laws" means that the laws are to apply equally to everybody but the N.A.A.C.P. That is the opposite of the ordinary understanding of the equal protection clause. Section 57-40 might well be unconstitutional if it exempted the applicant, because, if it did, other solicitors could claim that *they* were denied equal protection.

The impossibility of recognizing the proposed exemption can be illustrated by showing that it would be impossible for a statute to be drafted that could grant the exemption without either destroying the whole statute or rendering it unconstitutional.

1. Suppose, for example, a statutory exemption read: "but this chapter shall not apply to the N.A.A.C.P." It would be unconstitutional under *Morey v. Doud*, 354 U.S. 457, which held a state regulatory statute void because it exempted one corporation by name. The exempt corporation (American Express Company) was

a good corporation and the dissenting Justices thought it was so much better than all the others that the discrimination should be upheld.

2. Suppose, for example, a statutory exemption read: "but this chapter shall not apply to good corporations." The statute would be void for uncertainty. It would be even worse than the statute in *Lanzetta v. New Jersey*, 306 U.S. 451, which said, in effect, "all gangsters shall go to prison."

3. Suppose, for example, a statutory exemption read: "but this chapter shall not apply to any association some of whose contributors allege that if their names become known they will be persecuted." If merely making the allegation was enough, the statute could not be enforced against anybody, because anybody could allege that he was afraid.

4. Suppose, for example, a statutory exemption read: "but this chapter shall not apply to any association some of whose contributors actually will be persecuted if their names become known." Here, again, the supposed statute would be too vague for enforcement. This is the exception that the applicant invites us to write into the law. The writing of such an exemption would be a legislative and not a judicial function. If the legislature should wish to formulate such an exemption it would run into insuperable difficulties in attempting to make it both enforceable and constitutional. The N.A.A.C.P. is not the only soliciting group that has both friends and enemies. There are large groups who look with disfavor on those who contribute to the American Civil Liberties Union, the Anti-Vivisection Society, the Society for Planned Parenthood, the Ku Klux Klan, the Defenders of State Sovereignty, not to mention the long list of subversive organizations on the Attorney General's List.

[Insoluble Problems]

Under the supposed exemption there would be three insoluble problems of interpretation: (1.) How many of the contributors would have to fear persecution? The applicants do not claim that *all* their members risk persecution. The evidence submitted was to the effect that the *leaders* of the association were subjected to insulting telephone calls. The *followers* have not been persecuted. There has been no racial violence in Virginia. Virginia is not like some of her less fortunate sister states to the North where police reserves have to be mobilized

when a colored family moves into a white neighborhood. (2.) How many insulting telephone calls add up to persecution? When we talk about persecution in this context we do not mean burning at the stake or breaking on the wheel. The word is not capable of definition. (3.) What sort of evidence is to be received as evidence of persecution? Several witnesses testified that they had received insulting and threatening telephone calls. There is no way to meet or to weigh such testimony. Whether a message is threatening or insulting is a matter of subjective opinion. None of the witnesses was intimidated into changing his course of conduct, and each of the witnesses was proud to have it known that he is a member of the applicant. Mr. Martin A. Martin (Mr. Hill's partner) appeared in the courtroom wearing a necktie with "N.A.A.C.P." embroidered on it. It is abundantly clear that this Commission cannot construe the statute as if it contained the exception proposed by the applicant.

[General Statute]

This 1924 statute that we are asked to construe was not directed at any one group but at all groups. The Supreme Court of the United States has had before it many statutes directed primarily at specific groups such as Jehovah's Witnesses, the K.K.K., the N.A.A.C.P. and the communists. Such statutes, of course, raise questions under the equal protection clause that are not involved in the present controversy. When a state adopts regulations relating solely to a specific group it has to convince the Supreme Court that there are special reasons for the special treatment. Here it is the applicant who is demanding special treatment. It does not complain that the statute discriminates against it; it complains because the statute does not discriminate in its favor.

Uphaus v. Wyman, 3 L.Ed.2d 1090, (1959) is the latest Supreme Court decision on the compulsory production of names. The court by a vote of 5 to 4 held that the State of New Hampshire could constitutionally send Uphaus to jail and keep him there until he produced the names. The Joint Resolution of the Legislature involved in that case was directed at a single group ("subversives") and was in that respect very unlike the statute involved in this case. The Attorney General demanded production of a list of guests at a summer camp and Uphaus,

on behalf of the corporation that ran the camp, refused to produce it.

In that case the state was discriminating against Uphaus and his associates. It did not require other associations to produce books. Consequently, everything the court said is *a fortiori* applicable to a case in which there is no discrimination against anybody. The question is whether the state has a legitimate interest in the inspection of the books. The N.A.A.C.P. admits that the State of Virginia has a legitimate interest in inspecting the books of all solicitors of funds except the N.A.A.C.P.

The following quotations from the opinion of the Supreme Court throw light on the question before us:

"Moreover, the right of the State to require the production of corporate papers of a state-chartered corporation in an inquiry to determine whether corporate activity is violative of state policy is, of course, not touched upon in *Nelson* and today stands unimpaired, either by the *Smith Act* or the *Nelson* opinion."

"The interest of the guests at World Fellowship in their associational privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones. Whether there was 'justification' for the production order turns on the 'substantiality' of New Hampshire's interests in obtaining the identity of the guests when weighed against the individual interests which the appellant asserts. *National Assn. for Advancement of Colored People v. Alabama (US)* supra."

"Nor was the demand of the subpoena burdensome; as to time, only a few months of each of the two years were involved; as to place, only the camp conducted by the Corporation; nor as to the lists of names, which included about 300 each year."

"The camp was operating as a public one, furnishing both board and lodging to persons applying therefor. As to them, New Hampshire law requires that World Fellowship, Inc., maintain a register, open to inspection of sheriffs and police officers. It is contended that the list might be 'circulated throughout the States and the At-

torney Generals throughout the States have cross-indexed files, so that any guest whose name is mentioned in that land of proceeding immediately becomes suspect, even in his own place of residence.' Record, p. 7. The record before us, however, only reveals a report to the Legislature of New Hampshire made by the Attorney General in accordance with the requirements of the resolution. We recognize, of course, that compliance with the subpoena will result

in exposing the fact that the persons therein named were guests at World Fellowship."

There can be no doubt that the public has a legitimate interest in the books of those who solicit funds from the public. The only sure method of finding out what is in the books is by inspecting them. We therefore interpret § 57-40 to mean that the books shall at all times be open to the inspection of the State Corporation Commission.

DILLON, *Chairman*, and HOOKER, *Commissioner*, concur.

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THE SECRETARY OF AGRICULTURE
WASHINGTON, D. C.
TO THE SECRETARY OF THE INTERIOR
WASHINGTON, D. C.
SIR:
I have the honor to acknowledge the receipt of your letter of the 14th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

STATE OF NEW YORK

IN SENATE,
January 10, 1900.
REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE,
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
MAY 1, 1899.

ALBANY:
JANUARY 10, 1900.
J. B. LEECH, STATE PRINTER.

OFFICE OF THE COMMISSIONER OF THE LAND OFFICE,
ALBANY, N. Y.
JANUARY 10, 1900.



